

The Meaning and Legacy of the Magna Carta

Editor's Introduction

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The six essays of this symposium address different aspects of the meaning and legacy of the Magna Carta—"the Great Charter" in Latin. Although social scientists and legal scholars routinely describe the Magna Carta as foundational for concepts of justice and liberty, the charter itself is rarely assigned in political science classes or scrutinized by political theorists. The aim of the symposium is twofold: first, to affirm the document's historical rootedness and intellectual richness, and, second, to explore the ways in which the Magna Carta's text and reputation have informed the development of common law and modern politics. The Magna Carta was the product of times very different from our own, yet it continues to be cited by jurists and human rights activists around the globe. This symposium makes the case for why political scientists should take an interest in the Magna Carta, not just as a cultural icon, but as a durable political text.

The Magna Carta set out the terms of a *de facto* constitutional settlement between the crown, the country's most powerful families, and the community as a whole. While it affirmed numerous social distinctions, it nevertheless assumed a rough legal parity among those people designated as *free men*. Rather than proposing a wholesale overhaul of England's political and legal institutions, the Magna Carta honored the country's "ancient liberties and free customs." In common with other medieval charters, "Magna Carta took the form of a legal letter, recording agreements which the parties had already made verbally" (Breay 2002, 34). Its terms were negotiated between barons, church leaders, and King John in the winter and spring of 1215, following the devastating English military defeat in France the year before and the growing unpopularity of the monarch's policies (and sheriffs) at home. By June of that year, "a party of barons dressed in full armor had arrived to meet the king's representatives at Runnymede, a meadow by the River Thames between the baron's camp at Staines and the royal castle at Windsor. The detailed negotiations held there led to an 'agreement involving many concessions by the king'" (Breay 2002, 25).

The original charter, stamped with the king's great seal on June 15, 1215, contains 63 articles, the bulk of which are concerned with taxation, criminal justice, public administration, and royal abuses of feudal customs. Several clauses address the status and prerogatives of specific groups such as widows, landholders, Jews, Welshmen, juveniles, town-dwellers, the Church, and foreign merchants. Others focus on the proper conduct of constables, sheriffs, and bailiffs. The document's most striking aspect is its bold assertion of baronial privilege. In effect, it describes the role of the upper nobility as a kind of safeguard against the irresponsible or tyrannical use of monarchical power. The relationship between the language of the document and existing laws and practices of the time is complex, however. As the historian J. C. Holt has written, "Sometimes Magna Carta stated the law. Sometimes it stated what its supporters hoped would become law. Sometimes it stated what they pretended was law" (Holt 1992, 300).

Strictly speaking, the original charter was only valid for a few weeks. As soon as he was in a position to do so, King John renounced the document, and his ally Pope Innocent III helpfully released the king from his oath on the grounds that it was given under duress ("as unlawful and unjust as it is base and shameful"; Breay 2002, 40). Far from establishing a lasting peace, the negotiations at Runnymede represented "a pause and a source of fresh contention" (Holt 1992, 345). By late 1215, "King John was preparing to march against the barons, and the barons themselves were preparing to invite Louis, son of the French king Philip Augustus, to cross to London and to claim the throne of England as their nominated successor to King John. There followed a year of civil war, fought out across most parts of England" (Vincent 2007, 19). The conflict came to a halt with the sudden death of King John in late 1216. His only heir was his nine-year-old son, the future Henry III.

In the interests of easing tensions between the crown and the rebel nobles, and to "advertise the desire of the new royal regime to rule differently from King John . . . the guardians of Henry III now revived the Great Charter of June 1215, reissuing it at Bristol in November 1216, not now as an assault upon royal privilege but as a manifesto of future good government by the King" (Vincent 2007, 19). The Magna Carta was modified once again in 1217, when the articles relating to feudal rights and the royal forests were taken out and expanded into a separate Charter of the Forest (see Linebaugh 2008 and Hindley 1990,

chapter seven). In 1225, the court of King Henry III prepared yet another version of the document, which the king stamped with his seal "in return for a grant of taxation from his subjects sufficient to pay for war in both France and England" (Vincent 2007, 19). Within a few decades, it became "virtually inconceivable that Henry III or his successors could in any way seek to annul Magna Carta" (Vincent 2007, 20). The 1225 version was transcribed onto England's first statute roll at the end of the thirteenth century, under the aegis of Henry's formidable heir, Edward I (see Carpenter 2003 and Morris 2009.) By the middle of the following century, officers of the state were legally required to pledge to observe the terms of the charter. Three of its clauses remain statutory law in England and Wales.

The Magna Carta was the product of months of difficult negotiations and was drafted in a climate of near civil war. Much of the text is concerned with grievances that had been simmering for years. As Holt writes, the "Charter and its associated documents are complex records which bear the imprint of nearly three years of political crisis and protracted, discontinuous negotiation. They cannot be properly understood apart from this crisis" (Holt 1992, 188). Rather than setting forth universal principles, the document affirms the value of customary practices that, taken as a group, place strict limits on the autonomy of the crown. In locating the monarchy in a wider institutional matrix, Magna Carta draws on centuries of legal and political discourse concerning the duties of and relationship among various feudal constituencies, such as the landed nobility, clergy, merchants, foreigners, and the monarchy. At the same time, as Holt emphasizes, its specific formulations and emphases reflect the crisis of legitimization that engulfed the crown in the early thirteenth century.

In general, the document is careful not to stray too far from established norms. Its most audacious component addresses baronial prerogatives rather than popular liberties. In Article 61, the barons arrogate the right to "choose any twenty-five barons of the realm they will, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted and confirmed to them by this our present charter." If the "liberties" that were "granted and confirmed" by the charter were "offended," the barons reserved the authority to seize the king's "castles, lands, and possessions, and in such other ways as they can ... until, in their judgment, amends have been made." The "barons already had the capacity to levy war against the king and had already done so through the formal process of defiance and renunciation of fealty. The Charter now allowed them to distrain [i.e., seize the property of] the king by acts which were warlike, and yet still remain the king's men and retain title to land and liberties" (Holt 1992, 343). Article 61 expresses the leadership crisis of the period most acutely. It was excised from all subsequent editions in the interests of establishing peace.

A key source for the Great Charter's overall format and tone was the Coronation Charter of 1100, which Henry I issued on his ascension to the throne. In this epochal document, sometimes referred to as the Charter of Liberties, the king pledged to "take away the bad customs by which the Kingdom of England was unjustly oppressed."¹ Like Magna Carta, Henry I's charter opens by affirming the independence and

autonomy of the Church ("in the first place make the holy church of God free"), and then concedes a variety of privileges to noble families, including the right of barons' widows to choose whether and whom to marry. By implication, it embedded the crown in a legal framework that promised to promote the common good. The legal scholar Tom Bingham has described it as a "sort of non-election manifesto [that] promised relief from the evil custom and oppressive taxation of the previous reign, but also forbade the imposition of excessive penalties and required that penalties should fit the crime" (Bingham 2010, 11).

Both documents insisted that the monarchy conform to a subtly configured, multilayered environment. Furthermore, both drew on norms and concepts—most important, that free men enjoy certain customary rights and privileges—that found their expression in dozens of legal edicts and treatises composed from the seventh century onwards. Indeed, nearly 150 edicts and treatises were issued between the post-Roman era and the early thirteenth century in England. The earliest of these documents was drafted by King Aethelbert of Kent and his advisors in approximately 602 AD. Aethelbert's laws, as well as those of other Saxon and Norman monarchs, are preserved in a twelfth-century legal codex, the *Textus Roffensis*, a remarkable yet little-known repository of early English law. (A major international conference on the *Textus Roffensis* will be held at the University of Kent on July 25–27, 2010.²) If the Magna Carta is constitutive of the Anglo-American legal tradition—and, after all, nearly a thousand federal and state courts in the United States have cited the Magna Carta in formal decisions, and, in the half-century between 1940 and 1990, the Supreme Court cited the text in over 60 cases (Bingham 2010, 13)—it is at the same time indebted to Roman, Saxon, Norman, and Church (canon) laws, customs, and practices.

The Great Charter was originally written in Latin on papyrus. Despite its iconic status, the Magna Carta does not achieve the coherence of an eighteenth-century constitution or nineteenth-century legal code, nor is it a work of political philosophy. Its declaratory prose presumably met the practical needs of its noble-born petitioners. At the same time, much of its language has an incautious, open-ended quality that has clearly facilitated revisionist and ever more expansive reinterpretations. As more than one scholar has noted, the document has proved highly adaptable: "The class and political interests involved in each stage of the Charter's history are one aspect of it; the principles it asserted, implied or assumed are another. Approached as political theory[,] it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law" (Holt 1992, 18–19).

A thicket of pledges, stipulations, and restrictions can be found in the original charter's 63 articles. As noted previously, a fair number of these stipulations are concerned with the status and treatment of various collectivities and corporate bodies, including the Church, the city of London, foreign merchants, and Welshmen:³

¹ "The English church shall be free, and shall have its rights undiminished and its liberties unimpaired ... which we

shall observe and wish our heirs to observe in good faith in perpetuity" (Article 1)

- "The city of London is to have all its ancient liberties and free customs both by land and water. Furthermore, we will and grant that all other cities, boroughs, towns and ports shall have all their liberties and free customs" (Article 13)
- "All merchants are to be safe and secure in leaving and entering England, and in staying and traveling in England, both by land and by water" (Article 41)
- "If we have disseised [dispossessed] or deprived Welshmen of lands, liberties or other things without lawful judgment of their peers, in England or in Wales, they are to be returned to them at once" (Article 56)

Some take up aspects of (aristocratic) family law:

- "If any of our earls or barons, or others holding of us in chief by knight service shall die, and at his death his heir be of full age ... he shall have his inheritance on payment of the ancient relief ... if, however, the heir of any such person has been under age and in wardship, when he comes of age he shall have his inheritance without relief or fine" (Articles 2 and 3)
- Legal guardians "shall not take from the land more than the reasonable revenues, customary dues and services ... and he shall restore to the heir when he comes of age" (Articles 4 and 5)
- "No widow shall be compelled to marry so long as she wishes to live without a husband" (Article 8)

Several sections are concerned with the movement of people and goods along rivers and waterways:

- "No vill [village] or man shall be forced to build bridges at river banks, except those who ought to do so by custom and law" (Article 23)
- "Henceforth all fish-weirs [fish traps] shall be completely removed from the Thames and the Medway and throughout all of England, except on the sea coast" (Article 33)

A plurality of clauses focus on the administration of justice:

- "A free man shall not be amerced [subject to arbitrary penalty] for any trivial offense ... and for a serious offense he shall be amerced according to its gravity" (Article 20)
- "No constable or any other of our bailiffs shall take any man's corn ... unless he pays cash for them" (Article 28)
- "No sheriff or bailiff of ours or anyone else is to take horses or carts of any free man for carting without his agreement" (Article 30)
- "No bailiff shall put anyone on trial by his own unsupported allegation without bringing credible witnesses to the charge" (Article 38)
- "To no one will we sell, to no one will we deny or delay justice or right" (Article 40)

- "We will not make justices, constables, sheriffs or bailiffs who do not know the law of the land and mean to observe it well" (Article 46)
- "All fines which were made by us [i.e., the King] unjustly and contrary to the law of the land ... shall be completely remitted" (Article 55)

No section is more practical in its application than Article 35, which specifies: "Let there be one measure of wine throughout our kingdom and one measure of ale and one measure of corn." Many of the document's stipulations have a similarly pragmatic feel. Yet the Magna Carta ends on a lofty, almost transcendental note: "The men in our realm shall have and hold all the aforesaid liberties, rights and concessions well and peacefully, freely and quietly, fully and completely for them and their heirs of us and our heirs in all things and places forever" (Article 63).

The document's best-known passage is probably Article 39, which is concerned with what we now know as due process and habeas corpus. Its framers did not intend for its promises to apply beyond the ranks of a fraction of the population, of course. Only subsequent developments make it possible for us to read Article 39 as an assertion of universal human rights: "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." That said, numerous clauses are vague or silent on the question of to whom the document's protections applied. Although some articles only applied to titled members of the community, numerous clauses left the beneficiaries of significant rights unnamed.

Although the incorporation of the Magna Carta into statutory law at the end of the century was by no means a foregone conclusion, English monarchs after King John reconciled themselves to the idea of working within its framework as long as any excessive expressions of baronial power were removed. The Magna Carta seems to have been only occasionally invoked during the following two centuries but was subsequently revived in the Tudor and Stuart eras. The writings of two prominent legal scholars, Sir Edward Coke (1552–1634) and Sir William Blackstone (1723–1780), powerfully shaped how the framers of the U.S. Constitution, among others, understood the charter. In particular, these writers helped reframe the Magna Carta as a cornerstone of individual property rights, rather than as a medieval text concerned with corporate and sectional interests (see Boyer 2003 and Prest 2008).

At different times, both left- and right-leaning groups have laid claim to the document. In the mid-nineteenth century, the Chartist movement in England embraced the Magna Carta as the "palladium of our liberties" (Brand 1927, 793). By the middle of the twentieth century, "the cultural development of Magna Carta led to its reification: it ceased to be an active constitutional force and became a symbol characterized by ambiguity, mystery, and nonsense ... it became an idol of the ruling class" (Linebaugh 2008, 192). The contemporary war on terror and, in particular, the extraordinary claims made on behalf of executive power by Bush administration lawyers, has brought the document into renewed focus for many legal thinkers. The modern

specialist literature is substantial, of course, with J. C. Holt's three books (1972, 1985, 1992) being especially admired by historians and legal scholars. Additional secondary sources include Clanchy (1998), Daniell (2003), Helmholz (1999), Howard (1997), Pallister (1972), and Prestwich (1990).

The articles in this symposium tackle a range of compelling themes, from the document's intellectual roots to its impact on contemporary jurisprudence. In his opening piece on the Magna Carta and the status of the Church, Cary Nederman revisits the document's first clause to address the longstanding question of "whether the charter represents a principled defense of human liberty or instead reflects a pragmatic statement of baronial liberties" (457). Elizabeth F. Cohen's contribution explores the implications of the language of the Magna Carta for modern concepts of sovereignty, territory, and citizenship. She finds that "laws based on dates and temporal durations" create "sovereign boundaries as powerful as territorial borders or bloodlines" (463).

The legal historian Bruce O'Brien recovers a "massive collection of older and near contemporary English laws," the *Leges Anglorum*, that was compiled shortly before the Magna Carta was set down on paper. As O'Brien notes, the collection includes "long interpolations and spurious codes that enunciated many of the principles that guided the baronial opposition to King John" (467). His article helps show how the Magna Carta is a part of a larger "legal literature of complaint" that stands "at the center of the development of English constitutional thought" (472).

Justin Wert explores the relationship of the Magna Carta to modern legal philosophy, with an emphasis on how "substantive readings of Magna Carta's *legem terrae*" by English and American scholars have fleshed out the document's libertarian potential (475). While Wert recognizes that the Magna Carta has been the subject of intense historical revisionism, he nevertheless suggests that "our acceptance of less than accurate histories is, at the very least, testament to our normative preference for more capacious notions of personal rights" (477).

Justin Dyer writes about the ways in which the ideas contained in the Magna Carta were incorporated into legal and political debates over slavery in the eighteenth and nineteenth centuries. Did "the protections and privileges associated with Magna Carta" inhere in "Englishmen *qua* Englishmen" or did the document establish "natural rights owed by virtue of a common humanity" (479)? Could its provisions be more plausibly interpreted as applying to slaves or to the southern states? "In our own day," Dyer points out, "the task of reinterpreting the meaning and legacy of the Magna Carta continues as we balance the demands of national security with the claims of individual liberty" (482).

Security and freedom are the subject of the symposium's final contribution, Robert Pallitto's piece on the Magna Carta and recent U.S. Supreme Court rulings on detainee rights and the war on terror. Although justices have made a point of referring to the Magna Carta since the country's inception, Pallitto rightly notes that "strong claims of executive power" under recent administrations have underscored the salience of "the history of the writ of habeas corpus" (483).

The inspiration for this symposium was sparked not only by these important recent Supreme Court cases, but also by the publication of Peter Linebaugh's *The Magna Carta Manifesto* (2008). Linebaugh's text has an aphoristic, polemically charged quality that many political scientists may find disconcerting. It is nevertheless a powerful read. The book's chief virtue is its recovery of the land question. Fierce disputes over royal forests, the role of the sheriffs, and access to common lands sat at the core of the great charter. Rather than exclusively focusing on Article 39 and questions of due process and the rights of the accused, Linebaugh shifts our attention to passages and themes that have been largely overlooked in the secondary literature:

Chapter 47 said, "All forests that have been made forest in our time shall be immediately disafforested; and so be it done with riverbanks that have been made preserves by us in our time." To disafforest meant to remove from royal jurisdiction; it did not mean to clear-cut timber or destroy the trees. Chapter 48 said, "All the evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officials, riverbanks and their wardens shall immediately be inquired into in each country by twelve sworn knights of the same county who are to be chosen by good men of the same county and within forty days of the completion of the inquiry shall be utterly abolished by them so as never to be restored." It refers to the common rights of the forest. The physical forest was woodlands; the legal forest was a royal domain under forest law where the king kept deer.

If noticed at all as part of Magna Carta, chapters 47 and 48 are often discarded as feudal relics. Yet if we see woodlands as a hydrocarbon energy reserve, we may be willing to give the subject more than a condescending dismissal. We need to adopt a "subsistence perspective." "In an age when the primeval instinct of foraging was nearer to the surface than it is today," wrote Marc Bloch, the great scholar of the Middle Ages, "the forest had greater riches to offer than we perhaps appreciate. People naturally went there for wood, a far greater necessity of life than in this age of oil, petrol, and metal; wood was used for heating and lighting (in torches), for building material (roof slats, castle palisades), for footwear (sabots), for plough handles and various other implements, and faggots for strengthening roadways." Usually the soil belonged to the lord while grazing belonged to the commoners, and the trees to either—timber for the lord, and wood to commoners. Whole towns were timber-framed: the strut and beam of cottages, the curved wooden rafters, the oak benches of worship. Then wheels, handles, bowls, tables, stools, spoons, toys, and other implements were all made of wood. Wood was the source of energy.

The growth of state power, the ability to make war, and complaints against the monarchy arose from its power to *afforest*, or place under royal law. An authority writes that the principal grievances behind Magna Carta were two, "the malpractices of the sheriff and the extent of the forest" (Linebaugh 2008, 31–34).

Scholars continue to debate the meaning of the Magna Carta. Its legacy is far from resolved. The aim of this symposium is to invite members of our discipline to reconnect with ongoing conversations regarding the Magna Carta, early English law, and the deep sources of law and politics in the Anglophone world. ■

NOTES

1. A complete translation of Henry I's Coronation Charter may be found at <http://www.fordham.edu/halsall/source/hcoronation.html>.
2. The conference builds on the efforts of the Early English Law project (www.history.ac.uk/eel), and the scholarship and teaching of the Oxford historian Patrick Wormald (see, for example, *The First Code of English Law* [2005] and *The Making of English Law: King Alfred to the Twelfth Century* [1999]). See also Bartlett (2002), Sawyer (1998), and Van Caenegem (1988).
3. Just as there are several iterations of Magna Carta, there are innumerable translations. Here I have used Holt's literal translation of the 1215 Latin text. See Holt 1992, 448–73.

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The Liberty of the Church and the Road to Runnymede: John of Salisbury and the Intellectual Foundations of the Magna Carta

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Scholars generally agree that the Magna Carta of 1215 was a watershed in Western (and, more specifically, English) legal and political history and thought. Beyond this simple statement, however, there is little consensus concerning the nature and significance of the Magna Carta's achievement. One central unresolved issue centers on whether the charter represents a principled defense of human liberty or instead reflects a pragmatic statement of baronial liberties. The dispute over this question is nontrivial and reflects much more than a matter of language. If one subscribes to the former belief, which received its classic articulation in the seventeenth century (Turner 2003, 145–82) and retains powerful resonance today (Linebaugh 2008), then the Magna Carta deserves to be accorded a foundational role in the intellectual and political history of the liberal-democratic constitutional tradition, in which the rule of law is deemed the basis for the protection of individual freedom. If, however, one adopts the viewpoint of “the modern historian” that the charter “is a statement of [specific] liberties rather than an assertion of [general] liberty,” then the document should be read narrowly as an interesting artifact stipulating elite “privileges” that were “devised mainly in the interests of the aristocracy” (Holt 1965, 4). In other words, either the Magna Carta reflects deeper philosophical doctrines and commitments that enjoy purchase beyond their specific time and place, or it represents an expression of the immediate demands and grievances of a specific class displeased with the conduct of King John's government.

Both interpretations of the Magna Carta are supported by reasonable arguments. A primary author of the charter seems to have been Stephen Langton, the Archbishop of Canterbury, who served as mediator between the king and the barons at Runnymede and whose Paris education bespoke a deeply learned man (see Powicke 1928 and Baldwin 2008). Fryde recently attempted to trace how Langton's knowledge of theoretical precepts, particularly the distinction between law-abiding kingship and lawless tyranny, shaped the premises embedded in the Magna Carta (Fryde 2001, 100–11). Even Holt, perhaps the most influential advocate of the “modern” historical reading, avers that the “Magna Carta was intimately connected ... with developing political theories of the twelfth century” (Holt 1965, 20; see also Holt 1985, 203–16). On the other hand, the circumstances of the charter's composition

and proclamation have by now been so scrupulously studied that it is difficult to resist the conclusion that “it was the product of a particular historical situation” (Jones 1971, 209) rather than a principled assertion of fundamental law and human freedom. Indeed, detailed analysis of the identities and affiliations of the members of the baronial party that pursued the settlement achieved in the Magna Carta has yielded a clear picture of how the document embodies a quite specific agenda (Holt 1961). Moreover, it has been pointed out that the concept of “liberties” expressly employed by the charter still relies upon the customary feudal idea that privileges are personal (varying according to class and individual), are conferred by a superior, and may thus be removed by a superior for just cause (Turner 2009, 187). Hence, no blanket or universal statement of civic or inherent rights on a modern scale can be attributed to the Magna Carta with any historical plausibility (Holt 1972, 149–58). Rather, the grant of liberties in the charter should be understood entirely in terms of a concession to a small cadre of nobles with certain privileges who were ordinarily immune from direct oversight by the king. In this sense, the English magnates were ceded the freedom to use their feudal rights as they saw fit.

But this is not the only way in which the language of liberty is employed in the Magna Carta. In both the first and the final articles of the charter—and at several places in between—the text refers to another sort of liberty: the liberty of the Church. Indeed, Article 1 begins with King John's declaration that he has “in the first place granted to God and by this our present Charter confirmed, for us and our heirs in perpetuity, that the English church is to be free (*Anglicana ecclesiastica libera sit*), and shall have its rights undiminished and its liberties unimpaired” (Holt 1965, 316). The article then refers to John's proclamation, in the previous year, of a charter in which he announced his respect for ecclesiastical liberty (see Stephenson and Marcham 1972, 114–15), particularly with regard to “freedom of elections (*libertatem electionum*), which is thought to be of the greatest necessity and importance to the English church” (Holt 1965, 316). Only after acknowledging the liberty of the Church does the Magna Carta make the famous grant “to all free men of our realm for ourselves and our heirs forever” of “all the liberties written forever, to have and to hold, them and for their heirs from us and our heirs” (Holt 1965, 316).

The principle of ecclesiastical liberty has a somewhat different connotation than the idea of feudal liberties. In particular, the medieval church claimed to enjoy a corporate form of liberty, based on its unique role as arbiter between things mundane and things heavenly. Such liberty afforded freedom from the control of secular rulers and their ministers to the Church as a whole, as well as to those people who staffed its offices and to its lands and other earthly possessions. Thus, for instance, churchmen could not be detained by temporal governors or tried and punished in their courts. Moreover, church properties were exempt from many of the financial imposts that secular authorities could demand of the laity. In addition, the Church was acknowledged as possessing the right to select its own officials without any external interference, as King John affirmed. One distinctive feature of this

mitting John to promises already made in his 1214 charter" (2009, 183). In sum, the major scholarly literature on the Magna Carta attaches little intellectual significance to the mentions of the liberty of the Church that run through the text of the charter. The charter is treated as essentially a secular document in which religious references are wholly extraneous to its central purpose.

In the present article, I propose an alternative approach to understanding the inclusion of ecclesiastical liberty in the Magna Carta that elucidates how this idea played a role—and an important one at that—in providing a conceptual edifice for the various grievances expressed and particular liberties enumerated therein. Specifically, I argue that the priority accorded to the liberty of the Church reflects a principle that enjoyed a well-established pedigree in England—namely, that

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idea of liberty is that it pertained to the body of the Church as a mystical union, not to individual churches or their leaders. The Church possessed specific liberties because it enjoyed a general form of liberty that did not depend on any grant from a secular dominion (see Berman 1983, 215–24). In this sense, the Magna Carta's statement of ecclesiastical liberty reflects a simple recognition of a form of freedom that already exists independently, rather than a concession that the king might rightfully withhold or revoke.

Scholars have tended either to overlook these references to the liberty of the Church in the Magna Carta or to dismiss their significance. For example, McKechnie, in his classic study, viewed the wording of Article 1's recognition of ecclesiastical liberty as "deplorably vague" (though in line with similar charters granted to the Church during the reigns of Kings Henry I and Stephen) and surmised that the mention of the subject reflected Langton's efforts to look after "the interests of the Church" (McKechnie 1914, 192, 39). Howard's commentary on the Magna Carta contains only one reference to the Church, in which he suggests that King John's intended strategy was "to win over opponents in the Church by granting the Church freedom of election" (1964, 8). Holt traces the inclusion of ecclesiastical concerns in the Magna Carta to continental precedents and concludes that the charter "revealed ecclesiastical influences of a limited, almost guarded nature" (1965, 190–95). Fryde, who provides a somewhat more extensive discussion of the clauses of the Magna Carta that refer to the Church, still maintains that the reasons for their insertion were mainly practical and rhetorical (2001, 97–99). Turner asserts that the Magna Carta's protection of the rights and liberties of the English Church contained "little that was new, merely com-

the good order of the realm as a secular community depended upon royal respect for the liberties of the Church. Thus, it was accepted as axiomatic that a ruler who does not keep faith with God and His Church will soon find that his subjects will not keep faith with him. In short, ecclesiastical liberty forms the foundation of and prerequisite for temporal political harmony, so that a prince who denies the Church its proper freedom undermines his own capacity to govern. This theoretical precept was propounded with special force by John of Salisbury, a Paris-educated churchman who served at the court of the Archbishop of Canterbury beginning in 1148 and later became a key supporter of Thomas Becket's struggle to defend the Church against King Henry II (Nederman 2005). John is perhaps best known as the author of the *Policraticus*, a massive and complex work composed between 1156 and 1159 that is often considered to be one of the preeminent English contributions to the so-called Renaissance of the Twelfth Century (Nederman 2003). But John also wrote and disseminated a number of other texts, including two collections of letters that serve as commentaries on ecclesio-political affairs in England and throughout Europe from the early 1150s to the early 1170s.

Fryde has speculated that Archbishop Langton was familiar with the *Policraticus* and adopted its ideas about the difference between the true king and the tyrant in framing the Magna Carta (Fryde 2001, 105–10), concluding that "John of Salisbury made the idea that the King is subject to law accessible . . . John of Salisbury's ideas also inspired the Magna Carta" (2001, 111). Certainly, there is good evidence that the *Policraticus*, as well as John's letter collections, circulated widely in England after his death (Linder 1977a; Linder 1977b;

Bollermann and Nederman 2009). Turner has criticized Fryde's attributed lineage, however, on the grounds that it ignores many other alternative sources also available to Langton and the barons (Turner 2009, 12–13). There is an even more obvious objection to be posed: the Magna Carta simply does not employ the language of "king under law" versus "tyrant above law" that Fryde ascribes to it. Rather, the charter's main intellectual matrix is constructed upon the language of liberty, as already noted. Thus, it seems somewhat inaccurate to attribute any influence on the Magna Carta to John of Salisbury on the basis of the distinction he articulated between the king and the tyrant. More promising, by contrast, is the view that John's defense of the freedom of the Church, which is a dominant theme of the *Policraticus* and his other works, may have played a significant part in the understanding of liberty on display in the Magna Carta.

The following article examines this issue to shed light on the supposed dichotomy between *liberty* and *liberties*. I argue that the character of the liberty asserted in the Magna Carta shares some important qualities with John's theory. More specifically, I claim that the Magna Carta echoes John's position that ecclesiastical liberty enjoys an independent basis distinct from particular grants of liberties, one which licenses a more corporatist conception of political order than the practical, feudal interpretation permits. Colloquially speaking, the ability of the Church to perform its spiritual tasks unimpeded constitutes the glue that holds together the bonds of society. When this liberty of the Church is disturbed, the very presence of peace and justice in a kingdom is eroded, so that the health of the body politic is endangered. Whether or not it is possible to identify any direct influence of John's thought on the Magna Carta (through Langton and his clerical colleagues), his doctrine can help us to understand how the charter's insistence upon the Church's liberty provides some important clues to its intellectual assumptions about the relation between earthly and spiritual authority.

The primacy of the Church and its officers in the political life of the earthly community is underscored by John in his well-known conception of the body politic. The *Policraticus* articulates a complex and influential version of the organic metaphor for the political community. John compares the ruler to the head, the counselors to the heart, the various administrators and officials to the several organs and limbs, and the peasants and artisans to the feet (1990, 5.2, 67–68).¹ Within this scheme, the priesthood enjoys a special position: "that which institutes and molds the practice of religion in us and which transmits the worship of God . . . acquires the position of the soul in the body of the republic . . . just as the soul has rulership of the whole body so those who are called prefects of religion direct the whole body" (1990, 5.2, 66–67). Metaphorically, no body (secular community) can exist without the animation provided by the soul (Church): "It is the nature of the body to be alive and active, to yield to the soul's impulses, and to obey it as by a sort of harmony with it . . . the soul derives life from the fact that it possesses activities in its own realm, undoubtedly receives its impulses from God, [and] obeys Him with complete devotion . . . As long therefore as the body is alive in all its parts, it is entirely subject to the soul, which is

diffused not part to part but exists as a whole and functions in each and every part" (1938, 3.4, 153). By analogy, the Church necessarily forms the core of a properly constituted earthly polity.

The duty of the king, then, is first and foremost to direct his subjects toward the practice of virtue and the worship of God by revering the priesthood and submitting to its guidance. In this vein, John asserts that "the prince is therefore a sort of minister of the priests" (1990, 4.3, 32), in the sense that the former aims to realize in secular affairs what the latter seek in the spiritual realm—namely, the realization and imposition of divine justice. In the well-ordered body politic, the officers of both the Church and the temporal government strive "to procure the salvation of themselves and others by rooting out and correcting vices or by implanting and increasing virtues," albeit with the proviso that "those who minister to [God] in the sphere of human law are as much inferior to those who minister in divine law as things human are to things divine" (1927, 5.4, 79). Kings and priests perform coordinate tasks, but the goals associated with the clergy render them senior partners in their relationship with earthly rulers.

Throughout the *Policraticus*, John emphasizes that a crucial precondition for the Church to serve its role as the main source of correction and education in moral and spiritual matters is its possession of liberty. Why is this so? John insists strongly on an intimate connection between liberty and virtue. Virtue, he says, "does not arise in its perfection without liberty, and the loss of liberty demonstrates irrefutably that virtue is not present. And therefore anyone is free according to the virtue of their dispositions and to the extent that one is free, the virtues are effective" (1990, 7.25, 176). The reason for this connection stems from John's view that the Church's function in guiding people away from vice and toward virtue presupposes the ability of priests to speak freely and openly about the requirements of ethical and spiritual rectitude. He counsels that the pious Christian must exercise "patience" with the moral criticisms offered by clerics. "The best and wisest man is moderate with the reins of liberty and patiently takes note of whatever is said to him," John observes, "and he does not oppose himself to the works of liberty, so long as damage to virtue does not occur. For when virtue shines everywhere from its own source, the reputation of patience becomes more evident with glorious renown" (1990, 7.25, 176–77). The patient man respects the liberty of churchmen to reprove him in matters of behavior and faith: "The practice of liberty . . . displeases only those who live in the manner of slaves." In other words, good men tolerate correction by their spiritual guides, because "whoever loathes and evades [criticism] when fairly expressed seems to be ignorant of restraint" (1990, 7.25, 179). In sum, respect for the liberty of the Church and its ministers is an absolute requisite for the primary purpose of the body politic—the promotion of moral goodness and salvation—to be realized.

As a consequence, John condemns those rulers who "disturb the immunities of sacred things"—that is, who attack the liberty of the church—on the grounds that engaging in such conduct "is to rebel against God Himself and as it were to condemn Him to slavery" (1927, 5.5, 80). The faithful king confirms "in their entirety the privileges of churches, priests and

all sacred places" and respects ecclesiastical liberty by protecting clerics from violence and desecration while also guaranteeing their freedom from secular jurisdiction and law (1927, 5.5, 81–82). "The will of a true ruler," John maintains, "depends on the law of God and does not prejudice liberty" (1927, 8.22, 394). The ruler's failure to act in a manner consistent with the liberty of the Church, in turn, inevitably produces public discord and the destruction of the political community, which represents a punishment for his impiety; "Beyond doubt whoever suppresses the liberty of the Church is punished either in his own person or in his offspring" (1927, 7.20, 311). Loss of control over public patrimony and the political destabilization that results, sown from the discontent of subjects and authorized by God himself, reflects for John the sure outcome that princes who disrespect ecclesiastical liberty can and should expect.

In this regard, John cites the example of King Stephen (1135–1153), whose reign devolved into an open civil war that historians have often termed "The Anarchy." Stephen had usurped the English throne from the daughter of the preceding king, Henry I (1100–1135), contrary to his sworn oath to observe her legitimate claim to the crown. John maintains that "because God is truthful, the faith which he [Stephen] did not keep with God or his earthly lord, he no way found among his subjects. Indeed, loyalty was meted back to him in the same measure that he himself first meted it out to others" (1990, 6.18, 120). In John's view, it was not so much Stephen's refusal to keep his sworn promise that led to his downfall, as it was his decision, in June 1139, to arrest, imprison, and dispossess several powerful bishops whom he feared were plotting against him, in clear violation of the liberty of the Church (for the historical details, see Bollermann and Nederman 2008). John remarks that Stephen's "worst deed was that he put his hands on the anointed in contempt of God.... The seizure of the bishops was ... the beginning of his evil deeds and the more recent acts of the man were always worse than the previous ones" (1990, 6.8, 120). The violence and chaos of Stephen's reign, John concludes, ought to be attributed directly to his disrespect for the freedom enjoyed by clerics from secular courts and punishments (which the king had indeed promised in an 1136 charter upholding the liberty of the Church). Rulers who degrade ecclesiastical liberty and thus undermine the foundations of the political community are invariably destroyed by their actions as a form of divine vengeance.

The dual themes that good secular order depends upon the maintenance of ecclesiastical liberty and that God punishes those people (including monarchs) who oppress the Church, though figuring most prominently in the *Policraticus*, are ideas to which John returned throughout his career. In an 1160 letter addressed to King Henry II, composed on behalf of his employer Archbishop Theobald of Canterbury, John points out that when potentially divisive issues such as ecclesiastical vacancies arise, the "Christian prince" demonstrates his piety by deferring to the judgment of the Church. By contrast, John asserts that if a ruler conspires to interfere with or manipulate business that properly belongs to the clergy, "he calls down upon himself the all-powerful hand of the Most High" in the form of "discord between peoples [that]

beyond all doubt brings ruin upon kingdoms" (1955, 215–16). The message is clear: to flaunt the sacred principle of ecclesiastical liberty is to risk not only the opposition of subjects, but also political upheaval. John emphasizes, however, that King Henry II had thus far respected the rights of the Church: "We have found such unity and concord among your subjects that it is clear from sure and manifest signs that their faith is securely founded on the rock of the Church" (1955, 216). Whether or not this remark is hyperbole, John's position as a high-placed administrator in the English Church permitted him to reiterate the lesson of the *Policraticus* that public order depends upon the prince's deference to the liberty of the Church.

Upon the death of Theobald in 1161 and Becket's subsequent ascension to the archbishopric, King Henry II commenced a full-scale assault upon the Church's claim to be free of secular control. In John's second letter collection, which documents the events of the 1160s to the martyrdom of Becket, he directly and repeatedly associates the liberty of the Church with the cause of the archbishop against the king. John declares that "there is no more righteous cause than those who fight for the Church's liberty (*pro libertate ecclesiae*)" (1979, 236–37). In the archiepiscopal role as primate and defender of the English Church, John insists that Becket's stand is based on principle, not on personal advantage: "He does not seek immunities only for himself, which he could easily have won, but claims freedom (*libertatem*) for all" (1979, 526–27). The appeal to ecclesiastical liberty appears in virtually every letter that John wrote in support of Becket's activities during the mid-1160s. In turn, John asserts that King Henry's persecution of the English Church will ultimately imperil his ability to maintain his own government. John reiterates the view expressed in the *Policraticus* that rulers who incur the wrath of God by oppressing the Church will encounter his displeasure and be laid low (see 1979, 428–31). John predicts that "those who depart from the peace of God will doubtless perish. Can one find it written of any of the Church's persecutors that he escaped the vengeance of the right hand of God, who punishes the powerful with greater power? And so our lord the English king ... and his heirs (I say it with sorrow) must be greatly afraid that their kingdom will be rent asunder, and that the power which they wrongfully use against the Church will lose its force" (1979, 452–55). This is not an empty threat, John continues, since examples from both ancient times and recent experience yield the same conclusion: the use of royal power to destroy the liberty of the Church leads to a king's downfall if he does not repent and change his ways (1979, 454–57).²

Do we have good reason to suppose that John of Salisbury's view that the presence of ecclesiastical liberty formed the necessary prerequisite for secular political order filtered through the Magna Carta? One indication that this connection is plausible stems from a statement in Article 1: "We wish it thus observed, which is evident from the fact that of our own free will before the quarrel between us and our barons began, we conceded and confirmed by our charter, freedom of elections ... and obtained confirmation of this from the lord pope Innocent III" (Holt 1965, 316). In other words, the Magna Carta hints that a precondition of resolving temporal difficulties in the kingdom depends upon the restoration of the proper status of the

Church's liberties. Without the prior establishment of good relations between the king and the English Church, we may infer, it would be impossible to achieve any viable resolution to the conflict between King John and his discontented nobles. This claim only makes sense under the assumption that, for the parties involved in drafting and promulgating the Magna Carta, the priority of ecclesiastical freedom formed the absolute presupposition of public order within the kingdom, which was that no king can maintain the loyalty and support of his subjects without showing deference to the liberty of the Church. Such a position reflected the profound belief of medieval Christians such as John of Salisbury in the religious foundations of good government. Of course, the reliance upon ecclesiastical liberty in the Magna Carta by no means approaches the universalistic claim of human freedoms that more modern readers have sought to ascribe to it. But neither can the liberty of the Church be reduced to the conception of baronial liberties that historical scholarship attributes to the charter. Rather, the centrality of the doctrine of ecclesiastical liberty to the Magna Carta represents an alternate principle of freedom—requiring the acceptance of a specifically Latin Christian worldview—that is nonetheless historically grounded in the teachings and practices found among the English in the High Middle Ages, as articulated with particular clarity by John of Salisbury.³

NOTES

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1. Citations to the text of the *Policraticus* begin with the book and chapter numbers, followed by the page number of the relevant translation, as there is no single complete English version of the work. All of these translations are based on Webb's critical edition (John of Salisbury 1909).
2. A position that John likewise adopts concerning English King William (Rufus) II in his *Life of Saint Anselm*, written in 1163; see John of Salisbury 2009, 37–57.

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Jus Tempus in the Magna Carta: The Sovereignty of Time in Modern Politics and Citizenship

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In the English constitutional tradition, subjecthood has been primarily derived from two circumstances: place of birth and time of birth. People not born in the right place and at the right time are not considered subjects. What political status they hold varies and depends largely on the political history of the territory in which they reside at the exact time of their birth. A genealogy of early modern British subjecthood reveals that law based on dates and temporal durations—what I will call collectively *jus tempus*—creates sovereign boundaries as powerful as territorial borders or bloodlines. This concept has myriad implications for how citizenship comes to be institutionalized in modern politics. In this article, I briefly outline one route through which *jus tempus* became a constitutive principle within the Anglo-American tradition of citizenship and how this concept works with other principles of membership to create subtle gradations of semi-citizenship beyond the binary of subject and alien. I illustrate two main points about *jus tempus*: first, how specific dates create sovereign boundaries among people and second, how durational time takes on an abstract value in politics that allows certain kinds of attributes, actions, and relationships to be translated into rights-bearing political statuses. I conclude with some remarks about how, once established, the principle of *jus tempus* is applied in a diverse array of political contexts.

THE MAGNA CARTA'S UNCERTAIN BOUNDARIES

Because of its protoconstitutional status, it is reasonable to expect the Magna Carta to both express obligation and constitute a political community, yet, like the first iteration of the U.S. Constitution, the Magna Carta does not define the citizenry in any way that a modern reader might expect. The document contains very little precise language specifying who exactly its subjects are or setting boundaries around a citizenry. The Magna Carta's text makes vague references to place ("realm"), bloodlines ("heirs in perpetuity"), and consent ("freely and out of our good will have given and granted to the archbishops, bishops, abbots, priors, earls, barons and all of our realm these liberties") (Article 1; Turner 2003). But, in contrast with French explanations of *droit d'aubaine* (the right to pass property to one's heirs), which precisely delineated a French citizenry by denying the signature right of citizens to those born on foreign soil, the Magna Carta contains virtually no details about the legal characteristics of freemen or how a jurist or administrator might identify them (Wells 1995; Sahlin 2004).

Constitutive documents generally predicate citizenship on ascriptive, consensual, or substantive grounds (Brubaker 1992; Wheeler 1947). Scholarship on the constitution of citizenries generally identifies two ascribed principles of citizenship: citizenship based on blood lineage (*jus sanguinis*) and citizenship based on place of birth (*jus soli*; Brubaker 1992). *Jus soli* and *jus sanguinis* structure the conferral of citizenship by granting it to people at birth. Equally significant, particularly in the American tradition, is the principle of consent. Through what has been classified as the continental public law tradition of citizenship, ascription is replaced with mutual consent between an individual and a *demos* (Schuck and Smith 1985). A final—and the most dramatic—contrast from the ascription model of *soli/sanguinis* are conceptions of citizenship based on dense notions of the good, usually generated from civic republican traditions. In this view, people must meet substantive standards or exhibit specific qualities to achieve citizenship.

When one searches the text of the Magna Carta for detailed rules regarding who could and could not be considered a subject, virtually none can be found. In order for the rights delineated in the Magna Carta to actually constitute a polity with boundaries, these kinds of specifications needed to be enumerated. The interpretative acts that accomplished this, more than anything in the text of the Magna Carta, enabled sovereignty to be extended to a bounded community of subjects. The Magna Carta's most authoritative interpretations were penned by Sir Edward Coke. Coke translated common law political institutions, laws, and statutes (of which the Magna Carta is the preeminent example) into a system of jurisprudence with constitutional rights and liberties (Hulsebosch 2003). So authoritative are Coke's interpretations that he is sometimes considered an author of the British constitution.¹ The particular nature of his interpretations was such that some have also suggested that his ideas grounded the creation of the British Empire.² It is to Coke, then, that we must turn to understand exactly how the population of English subjects, and eventually citizens, came to be constituted.³

The bulk of Coke's conclusions on constituting the British citizenry can be found in his commentaries on what is known as *Calvin's Case* (1608). *Calvin's Case* involved the question of whether Robert Calvin, a Scottish man born after the union of the Scottish and English crowns under James I, was a subject of the crown and hence could legitimately inherit land. This right of inheritance was a signature right of subjects. At stake was the political status of not just Scots, but also people in other parts of the kingdom, aliens who had been admitted for

residence or temporary travel to England, and, finally, people residing in territories that had nonstandard political relationships to the crown, yet were in some meaningful way historically tied to English politics. (The latter group included people in territories that had been ceded to other sovereigns, or the reverse.) In short, *Calvin's Case* took up where the Magna Carta's constitutive vagueness left off. It addressed the question of how to differentiate between subjects and foreigners, as well as among the different kinds of aliens who were present within the kingdom.⁴

Coke identifies allegiance as the fundamental trait that distinguishes subjects from aliens and subjecthood from other kinds of political statuses. Coke states that "they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects and no aliens" (*Calvin v. Smith* 1608, 407).⁵ In *Calvin's Case*, Coke took as his main task the production and defense of standards for ascertaining who was in the allegiance of the king. Procedures for addressing nonsubjects (deciding who could be present and enjoy which protections of the king, as well as whether anyone not in the allegiance of the king could somehow be made a subject anyway) would follow therein.

JUS TEMPUS AND THE SOVEREIGNTY OF DATE IN CALVIN'S CASE

Coke invokes the principle of *jus tempus* (as I call it) in order to determine who was in the allegiance of the king. He argues that jurists must scrutinize birthright to ascertain a person's allegiance. Subjects are people born fully and solely in the allegiance of the king's natural body, which ruled both England and Scotland (Meyster 2001; Price 1997, 83–84, 113, 115). In other words, a person's spatial location at the precise moment of his or her birth determines his or her allegiance. Although the Magna Carta makes vague references to birth in the realm, Coke is explicit that the time of birth is at least as important for determining allegiance as the place of birth. He writes, "the time of his birth is of the essence of a subject born; for he cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the king" (*Calvin v. Smith* 1608, 399). Merely swearing an oath cannot constitute subjecthood because "ligeance doth not begin by the oath in the leet. . . . Swearing in a leet maketh no denization" (*Calvin v. Smith* 1608, 382). Obedience itself is a birthright, not a decision, choice, or act, and it determines whether one can enjoy the protection of the freedoms spelled out in the Magna Carta, as well as in the rest of the common law tradition.⁶ By stating that allegiance is set at the time of birth, Coke makes the time of a potential subject's birth as important as his or her place of birth.⁷ This principle, *jus tempus*, serves as important a role as place of birth or parentage in determining who can enjoy the freedoms spelled out in the Magna Carta and other parts of the common law tradition.

In order to specify who was actually born into the allegiance of King James, Coke gives a detailed political history of each of the territories potentially containing James' subjects. This included primarily Scotland, Ireland, Normandy, Aquitaine, Calais, Gascony, and Guyan. He traces the history of each territory's political relationship to the crown. Through

these political histories, Coke very carefully details what Magna Carta had left undefined: namely, who could be considered a subject based not only on political principle, but also on historical circumstance. Foremost among the territories whose peoples were of special interest when Coke was writing were the Scottish and the Irish. Coke sifts through the arguments presented to the court and a lengthy history of the subjects in question and concludes that the Irish are not full subjects of James. The Scottish *postnati* (born after the union of the crowns), of which Calvin was one, were indeed subjects. The *antenati* (persons born prior to the union of the crowns) were not.

In drawing a line between the *antenati* and *postnati*, Coke applies the principle of *jus tempus* to the actual population of potential subjects of James I. Calvin was born after James had assumed the throne, joining England and Scotland in political union. By elaborating this principle of *jus tempus*, Coke does not simply show how to draw political boundaries around sovereign territorial boundaries. He demarcates sovereign boundaries in time that are every bit as powerful as those drawn in the soil.

Jus tempus affects the kinds of boundaries that can be drawn within, as well as around, a population or citizenry. Coke's interpretations of the Magna Carta and the English constitutional tradition in *Calvin's Case* illustrate an instance of these internal boundaries. Despite his concern for explaining the bases and applications of membership rules, Coke does not bifurcate the British population into subjects and aliens. Mirroring the allusions to foreigners in the Magna Carta in far more precise terms, Coke describes aliens as either permanent or temporary, friend or enemy, and by birth or circumstance (*Calvin v. Smith* 1608, 397). He also affirms the Magna Carta's implication that aliens can be given safe passage by a grant of the king (*Calvin v. Smith* 1608, 396). Each type of alien status is associated with different privileges, most of which revolve around the crucial questions of landholding and the passage of holdings to heirs. Coke lays out a set of distinctions that is friendly to the idea of foreign persons in the kingdom and even permits friendly foreigners to own some property (Coke points out that they need to house themselves), although he also applies a principle of *jus sanguinis*, forbidding the passage of property from an alien to that person's children (*Calvin v. Smith* 1608, 394). Adding further complexity, the Irish were considered neither subject nor alien, but rather denizens based Coke's reports.⁸ Coke's Magna Carta therefore anticipates a variety of degrees of dominion over people who are not full subjects.⁹

JUS TEMPUS AND DURATIONAL AUTHORITY IN ANGLO-AMERICAN CITIZENSHIP

The constitutional tradition bequeathed by Coke's interpretations of the Magna Carta and refracted through an American lens accords authority to temporal duration as well as specific dates.¹⁰ By this, I mean that precise amounts of time acquire political authority. In combination with other principles of citizenship such as *jus soli*, *jus sanguinis*, and consent, durational *jus tempus* uses these precise amounts of time to translate political experiences and relationships into political

status and rights.²¹ Barbara Adam provides a clarifying conceptual analogue to this principle when she cites Marx's observation that "time is the decontextualized asituational abstract exchange value that allows work to be translated into money" (Adam 2004, 38). Similarly, as the following shows, durational time takes on an abstract value (although not any that can be measured in exchange value) in politics that allows certain kinds of attributes, actions, and relationships to be translated into rights-bearing political statuses.

The importance of durational authority became apparent early in U.S. constitutional history in the decision of *McIlvaine v. Coxe* (1805), which cited the concept of *antenati* developed in *Calvin's Case*. Like the British version, the U.S. Constitution did not include explicit, detailed definitions or standards for citizenship. These definitions and standards were developed and described piecemeal in the centuries that followed the founding. Just as the union of Scotland and England had posed a political dilemma for the British, so too did the aftermath of the Revolutionary War create questions about citizenship for people in the United States. At issue in *McIlvaine* was the political status of persons who had been loyal to the British crown and wished to be considered U.S. citizens after the signing of the Constitution. In this decision, the court determined that Daniel Coxe, a former loyalist whose relatives sued to have him deemed an alien in order to deprive him of property bequeathed to him, was deemed to have given consent and been consensually admitted to the citizenry. Coxe had sided with the British during the war and held office under the king's authority in British-controlled Philadelphia in 1777, later leaving for England in 1779 (Kettner 1978, 201). Although the plaintiff sought to show that he had expatriated himself, Coxe had been in New Jersey at the moment that the Constitution was established, and he had remained there for some time before departing. Based on his physical presence during this period of time, the judge ruled that he was a citizen. The ruling stated that, while circumstances of birth could no longer govern citizenship alone, his physical presence in the state of New Jersey during the adoption of its constitution and his continued residence in the state as the state explicitly adopted an act stating that all persons abiding in its territory at that time were members owing allegiance to it, did accord him citizenship (*McIlvaine v. Coxe* 1805; Kettner 1978, 200). It was through this principle that loyalists were incorporated into the United States (whose very formation they had resisted), just as the *postnati* were incorporated in England (Kettner 1978, 199–202). *Jus tempus* thus became an equal partner with *jus soli* and, in a departure from the British tradition, with consent as well.

McIlvaine's creation of naturalization procedures to alter a person's citizenship after the moment of birth acknowledged the authority of durational time in politics. Coxe's citizenship was not born in a day, but rather developed over a specific period of time spanning from New Jersey's declaration of sovereignty to the passage of laws under which Coxe could be a member in allegiance to them (*McIlvaine v. Coxe* 1805, 212.) This authority of durational time over citizenship has implications that reach far beyond founding moments. In fact, its importance could already be seen in the deliberations over

the 1790 Naturalization Act. Although this act is rightly famous for its racialized distinctions based in *jus sanguinis*, deliberations over the terms of the act reveal an almost obsessive concern with the exact length of time required to develop or demonstrate the qualities associated with citizenship. To this day, probationary periods accord foreign-born individuals some, but not all, rights of citizenship when they spend legally designated amounts of time in the territory. Additionally, similar to date-based *jus tempus*, durational *jus tempus* inscribes boundaries inside of, as well as around, populations. Even natural-born children must await the arrival of their "age of consent" to exercise the full rights of citizens. And, just as in other exchanges, not everyone's time has equal political value. As Hammar points out, some people's times of residence will earn them future rights and status, while others (notably the undocumented) will not be counted (Hammar 1994, 194). Many people's time is likely to never translate into full membership. Thus, temporally circumscribed visas grant very limited rights to people for temporary asylum, temporary work, and temporary terms of study.

The concept that durations of time have authority in the Anglo-American citizenship tradition is not surprising. The Magna Carta's age itself has been cited as a decisive element of its supremacy. As Pocock states, "If the constitutionalists could show that the laws were as, or older than, kings, they might go on to assert a contractual or elective basis for kingship" (Pocock 1987, 56). It is the longstanding Englishness of the Magna Carta, as well as its sources, that lend each the authority to establish sovereign dominion. In fact, one of Coke's arguments against considering the Irish as full subjects hinged on the fact that the Irish were governed by their own code of law that was itself ancient and historically distinct from the laws governing the English and, post-Union, the Scottish. Coke wrote that the Irish "retain unto this day divers of their ancient customs, separate and diverse from the laws of England." (*Calvin v. Smith* 1608, 398). Somers identifies a significant philosophical underpinning of this point. She states that Locke's justification of a consent principle in his move from pre-political to a contract-based polity is rooted in a "temporal narrative" that describes a causal sequence ending with the establishment of citizenship that is spatially distinct from that which precedes it (Somers 2008, 274–77).

CONCLUSION

Through the interpretations of Edward Coke and subsequent incorporation into U.S. citizenship traditions, the Magna Carta became a vehicle for the introduction of the variable of time into the politics of citizenship. Once the principle of *jus tempus* is identified, a vast array of political implications reveal themselves. As noted earlier, Pocock has observed the authority accorded to documents based on their age, while Rubenfeld has critiqued a perceived over-privileging of political will of people in the present (Rubenfeld 2001, see especially chapter 2). Times and durations structure other facets of political membership as well. States of emergency and exception identify periods in time when people's rights may diminish or change. Political theorists refer to the concepts of transience and permanence to distinguish legitimate

members of the *demos* from nonmembers (Dahl 1989, 129). *Jus tempus* also inflects legal practices such as respect for precedent, trying persons only one time for any given crime, and protecting people from being tried for acts that were criminalized after they had been committed. People must attain ages of consent, majority, and seniority in order to acquire certain rights. In these cases, age acts as a proxy for capacity and entitlement rather than allegiance. What these examples have in common is that for each instance of *jus tempus*, the sovereign boundaries delineated by time serve to inscribe populations from within. They join governmental and normative principles of politics in ways presaged by Coke's argument about the different allegiances of the *antenati* and the *postnati* in seventeenth-century Britain. ⁵¹

NOTES

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1. "Coke's work helped create the Anglo-American idea of a constitution: a national legal environment anterior to the positive law of kings, their courts, and legislatures. In this sense he was a framer of the British constitution" (Pocock 1987, 38). "Coke's frame of the ancient common laws of this realm" was a canon of iconic common law institutions (preeminently the jury), core rules (like an heir's right to inherit property), and historic statutes (the most famous being Magna Carta). Like most canons, it was dynamic: some elements dropped off and others were added over time. By the middle of the seventeenth century, this canon was known as the ancient constitution—though Coke never used that term." (Hulsebosch 2003, 444).
2. "Coke's *Institutes* transformed a geographically defined nation into a legally defined one and assured readers of the ability to abandon geographical boundaries without losing legal national identity" (Bilder 2004, 33). Hulsebosch uses the phrase "spatial, temporal, and genetic" in reference to Coke's concept of *ligeance* (Hulsebosch 2003, 445 and n86).
3. Hulsebosch calls Coke the "ablest curator of this constitution" (Hulsebosch 2003, 445 and n86).
4. As I have written elsewhere, these kinds of "semi-citizenships" are integral to the instantiation of the modern state (Cohen 2009).
5. Coke wrote, "But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects" (*Calvin v. Smith* 1608, 382). Here, Coke's reference to "higher" is a comparison to other political relationships, principally feudal hierarchies of lord and tenant.
6. The case does discuss the fact that possession of a noble title to which a person had been born in Scotland would not entitle him or her to the equivalent in England, although this fact is not central to the argument of this article (*Calvin v. Smith* 1608, 394).
7. A few others have noted this parenthetically (e.g., Price 1997, 117; Bilder 2004, 36).
8. Coke is notoriously vague on the subject of the Irish. Both he and the other main source of commentary on Calvin's Case, Francis Bacon, imply that the Irish are not subjects, and indeed they were not treated as such. However, this matter is the least precise element of Coke's writing on the case.

9. Although it would be a stretch to say that *Calvin's Case* portends empire, Coke's words certainly were not hostile to such a concept.
10. Schuck and Smith write, "Coke's position remained the universally cited starting point for Anglo-American legal analyses of political membership through at least the nineteenth century" (Schuck and Smith 1985, 13). Hulsebosch calls Coke the "ablest curator of this constitution" and uses the phrase "spatial, temporal, and genetic" in reference to Coke's concept of *ligeance* (Hulsebosch 2003, 445 and n86).
11. Many have noted that a variation of *jus soli* similar to that which Coke describes has become integral to U.S. citizenship, as does a consent principle that departs from Coke's ascription-based model and is expressed most directly by the Fourteenth Amendment, although the principle (itself became apparent well before the Civil War or Reconstruction (Meyler 2003; Schuck and Smith 1985).

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Forgers of Law and Their Readers: The Crafting of English Political Identities between the Norman Conquest and the Magna Carta

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A short time after 1206 and before 1215, a Londoner assembled a massive collection of older and near contemporary English laws, called the *Leges Anglorum* by historians, and inserted long interpolations and spurious codes that enunciated many of the principles that guided the baronial opposition to King John and later became part of the Magna Carta. To those familiar with the struggle leading up to the creation of the Magna Carta, these principles should cause no surprise. These ancient laws were made to proclaim that "in the kingdom right and justice ought to reign more than perverse will" (BCf4, 11.1.A.6; Liebermann 1903, 635).¹ In another part of the collection, King Arthur, making his first appearance in English law, is credited with establishing as law the requirement that all nobles, knights, and freemen of the whole kingdom of Britain swear "to defend the kingdom against foreigners and enemies" (BCf4, 32.A.5-7; Liebermann 1903, 655). More surprising is the attribution of the regularly assembled Hastings court in London to the Trojans (who became the Britons). The seventh-century West Saxon king, Ine, suddenly looms large in the ranks of Britain's lawmakers; he not only reigns for the good of all, but is also given the lordly virtues of twelfth-century chivalric romance: he is "generous, wise, prudent, moderate, strong, just, spirited, and warlike" (as was appropriate for the time and place) (BCf4, 32.C.2, 32.C.8; Liebermann 1903, 658-59). A confection of bits of other law, attributed here to King Alfred, orders an end to vice, national education for freemen, and unity for all "as if sworn brothers for the utility of the kingdom" (*Leges Angl*, Pseudo-Alfred 1-6; Liebermann 1894, 19-20). Finally, in the grandest statement of English political ambition, Arthur appears again as the great conqueror, whose spirit was not satisfied by Britain alone: "Courageously and speedily he subjugated all Scandinavia, which is now called Norway, and all the islands beyond, namely Iceland and Greenland, which belong to Norway, Sweden, Ireland, Gotland, Denmark, Samland, Vinland, Curland, Runoe, Finland, Wirland, Estland, Karelien, Lapland, and all other lands and islands of the eastern Ocean as far as Russia" (BCf4, 32.B; Liebermann 1903, 659).

These statements about justice and injustice, the evil of unchecked royal will, and the value of unity in defense of the land have long been associated with the opponents of King John in the decade leading up to the writing of the Magna

Carta (1215). Their political implications have been considered thoughtfully by many, most importantly by Felix Liebermann (1894), Walter Ullmann (1965), J. C. Holt (1985; 1992), and Ralph Turner (1994). However, these studies have been deficient on two counts: first, on the tradition of legal writing in England before 1215, and second, on the matter of Arthur. The text of the *Leges Anglorum*, with its Arthurian interlude, has always been treated as distinct from the older legal treatises that form its base. These treatises are in fact linked with the late Anglo-Saxon and Anglo-Norman world, whose legal thought and practices they are said to describe. The *Leges Anglorum*, however, is firmly tied not to these treatises, from which it derives the vast majority of its content, but to opposition to Angevin rule, and it therefore remains principally a political rather than a legal document.

A consideration of these older treatises highlights the London editor's singular choice of genre for a mode of political complaint in early-thirteenth-century Europe. Why did he decide that old treatises purporting to record the law under Cnut (1016-35), Edward the Confessor (1042-66), William I (1066-87), and Henry I (1100-35) were the appropriate canvas for his criticism of Angevin rule? This question is more ours than his; I do not doubt that he would locate the novelty of his interventions in their content, rather than in the genre chosen as their vehicle. Nevertheless, his decision to use old law was not arbitrary and only makes sense when set within the context of the development of legal literature in England, starting long before the Norman Conquest and extending into the twelfth century. The continuous creation, use, and reimagination of legal literature as a vehicle for political dissent had a significant impact on the development of English political thought throughout the medieval and early modern periods.

Second, scholars have had little to say about Arthur, as if it does not matter who made the statements on a king's duties. It has not mattered to scholars that one law was issued by Ine, another by Alfred, and others by Edward the Confessor and King Arthur. The context, spurious or not, is, however, of critical importance to our understanding of how English nobles and knights of the late twelfth and early thirteenth centuries imagined their past, since the author and readers at some level believed that other readers shared their vision. The choice of content and the employment of Arthur's name reveal the values of these people in a world transformed.

Rather than reflecting the fancy of the editor of the *Leges Anglorum*, this newly recast past reveals a shifting sense of the origin of law, kingship, and kingdom between the Norman Conquest and the composition of the London laws in the reign of John. By the time of the reign of the later Angevins, it seems clear that the author of the *Leges Anglorum* of London believed that Edward the Confessor, for all his stature as a recently canonized king, did not supply all that was needed for the new origin myth of English law being crafted. Edward could not serve unaided as a guide for the Angevin kings. He was not replaced, but reduced, remaining still an important part of the chain of kings who preserved and confirmed the old law, or, when that law slumbered during lawless ages, awakened it.

In this article, I first take a look at several Anglo-Norman treatises that reflect this tradition or refract it in the new circumstances of post-Conquest England. I then try to answer the question of why these treatises developed a political afterlife. Last, I look at that crowning achievement of this tradition—the *Leges Anglorum*—and offer tentative thoughts on what this collection signifies.

In the wake of their conquest in 1066, the new Norman kings of England announced that the laws that had governed the kingdom under Edward the Confessor (1041–66), the *laga Edwardi*, would remain in force. Similar affirmations of old law in the aftermath of conquests had occurred in England's past, most recently in 1018, when the conquering Danish king Cnut agreed to respect the law of the tenth-century king Edgar (Whitelock 1961, 97, and note 13). When the conquerors reaffirmed the *laga Edwardi*, they were making a traditional statement about the continuity of the old laws rather than referring to a specific text of those laws. Interestingly, while this message might have been clear to the English, it was not to the Normans, who strove to satisfy their own demand for records of the actual *laga* by the production of texts. It is likely that all the post-Conquest manuscript collections of Old English laws, including the encyclopedic *Textus Roffensis* (c. 1123) and Corpus Christi College (Cambridge) MS 383 (c. 1100), the three Latin translations of some of these laws (the *Instituta Cnuti*, *Consiliatio Cnuti*, and *Quadripartitus*), and the four "original" treatises of late Anglo-Saxon and Norman law, were produced by French-speaking scribes, translators, and authors, most or all of whom were under the patronage of French-speaking clergy (O'Brien 1999a, 133–34).² This response by the Normans is striking but not surprising. The claim to the throne was asserted by the Normans but hardly accepted by all of the English, and although conquest settled some matters, it neither settled the question of right to the throne nor produced the political stability that William I and his heirs desired (Garnett 1986; Garnett 2007, 1–44). To stress their legitimacy and translate it into terms the English understood, Norman kings frequently confirmed the ongoing force of pre-Conquest law, which made them appear to be a neater fit for the throne, just as it had for Cnut less than a century before (O'Brien 1996). The collection known as *Textus Roffensis*, for instance, includes an early copy of the coronation charter of Henry I (1100–35), which proclaimed the authority of the *laga Edwardi*. By the reign of Stephen (1135–54), if not earlier, this fundamental

laga was both literate and recorded principally by private individuals.

Assertions of this authority mark all post-Conquest legal literature. To review what has survived, let us first address the *Ten Articles of William I*. This small treatise lists measures primarily concerning relations between the Normans and the English. It regulates these relations in a typically English way—for example, protecting foreigners with a traditional royal suretyship and allowing each group to employ its customary mode of proof during disputes (Wormald 1999, 402–4). It was composed before 1123—the date of *Textus Roffensis*, its earliest manuscript copy—and may be from William I's reign. A second treatise—dating from the first two decades of the twelfth century—includes both a comprehensive translation of pre-Conquest Anglo-Saxon law, known as *Quadripartitus*, and a second book, the *Leges Henrici Primi* (Laws of Henry I), which provides a detailed description of the law in the time of that king (Downer 1972; Wormald 1994a, 111–47). This monumental two-volume work presented itself as the Norman king's confirmation of the *laga Edwardi*. The third treatise is the *Leis Willelme* (Laws of William); its earliest version was the first law book composed in Old French (sometime around the middle of the twelfth century). It records contemporary customs, translates some of Cnut's laws, and includes a few chapters indebted to Roman law (Wormald 1999, 407–9). Even at this early date in the life of the French language in England, English loan words are thick in the text, mostly pertaining to certain types of fines or crimes. Last, there is the *Leges Edwardi Confessoris* (Laws of Edward the Confessor), a treatise covering the kinds of law relevant to someone representing a bishop's household in local and regional courts. This document had appeared in two or three versions by the 1140s and was the most popular of the twelfth-century treatises portraying English law before and immediately after the Norman Conquest (O'Brien 1999a, 105–18).

All these codes attribute their contents to previous English kings. The *Ten Articles of William I* orders all men to observe "the law of King Edward . . . with the additions which I have decreed for the benefit of the English nation" (Liebermann 1903, 488). The *Leges Henrici Primi* and *Quadripartitus* identify their contents as the *laga Edwardi* but explain that this designation means the laws of King Cnut (1016–35). The *Leges Edwardi Confessoris* frames its contents as the laws and customs of the kingdom generated in 1070 by a great meeting of English nobles and confirmed by King William. These were not William's laws, although in the text, he is said to have authorized them, but rather the laws of Edgar, which had been revived by Edward the Confessor. The *Leis Willelme* also claims William and Edward the Confessor as its authorities (Liebermann 1903, 492). All of these assertions appear in treatises that were the work of anonymous individuals responding to authentic royal affirmations and, arguably, providing useful references to affirmed law (Green 1986, 97; Wormald 1994b, 243–66).

The confrontation between Henry II (1154–89) and Thomas Becket, archbishop of Canterbury, turned this tradition of private treatise writing and its early twelfth-century products into a vehicle for complaint by the time of the reign of John. After

sparring with Becket over questions of jurisdiction, penalties, and claims, Henry II summoned a council of magnates to meet in January 1164 to obtain their assent to what he claimed were the laws and customs of Henry I, the *laga Henrici*, as it were (Roger of Howden 1868-71, 1:222; Barlow 1986, 88-102). In short order, the older and wiser barons to whom Henry had delegated the task of determining these laws produced a list that was read to the council. Becket wavered, accepted, and then rejected the record, which led to his exile and the most significant crisis encountered by the English Church in the twelfth century.

The story of Henry and Becket is well known, but it is useful to point out how dramatically the situation had changed for an English king. While earlier kings like Cnut, Edward, or William I had appeased their powerful subjects, including their higher clergy, by renewing the old law, Henry II seems to have excited fear and opposition. The explanation for this difference cannot be that Henry II manipulated the prior law in threatening ways while earlier kings had honestly taken the laws they found and lived with the results. It is true that earlier kings and their subjects had been less concerned with written records than their more text-trusting successors, but this also cannot be the whole explanation.

Henry's customs were arguably a close representation of the practices of his Norman predecessors. As Barlow points out, "the historicity of the customs declared was never seriously challenged by Thomas and his adherents" (Barlow 1986, 102). Instead, Thomas and his supporters equated old customs with old abuses and set this point of view against the current thinking in canon law.

Intruding into the picture of English politics between the late eleventh century and Henry II's coronation was Church reform, in which proponents sought to locate the Church's own *laga* in something older than the arrangements of the previous reign and became increasingly active in researching, identifying, and legislating this *laga* anew (Duggan 1963, 67ff; Barlow 1979, 145ff, 268ff; Duggan 1996). Even if Becket himself was not much of a canonist at the time of Clarendon, many of his *eruditi* were, and it was probably on their advice that Becket resisted Henry's legislation (Smalley 1973, 124-28). For Becket to reaffirm the king's version of the old law was now to affirm an unacceptable situation.

While one tactic was simply to resist the king using the dictates of canon law or arguments grounded in theology, another approach was to counter the king's assertion of the authority of his collection of selected customs with evidence to the contrary. John of Salisbury, for one, doubted the veracity of Henry's claim that he was restoring the laws of his grandfather, Henry I: in his *Entheticus maior*, John refers to Henry II as Juvenal's "rope-dancer, who defends by the law of his grandfather whatever he attempts" (John of Salisbury 1987, 1: 200-01). Herbert of Bosham, one of Becket's biographers, thought that the barons had invented some of the customs (Herbert of Bosham 1875-85, 3:280). And although no one specifically mentions the need to rebut Henry II's claim that his assizes were nothing more than restatements of his grandfather's laws, the multiplication of copies of Anglo-Norman laws in ecclesiastical libraries after the 1160s is persuasive evidence of an intensification of interest that

may have been driven by clerical scepticism like John's and Herbert's. Judging by the number of surviving manuscripts and the exemplars and archetypes these imply, there must have been at least two dozen manuscripts containing treatises on Anglo-Norman law and post-Conquest translations of Old English laws in circulation by the 1180s, and another dozen by the early thirteenth century. Against this array of records of older English law, Glanvill's statement that English law was unwritten can be judged disingenuous (O'Brien 1999b, 11-14). English law was written, available, and in the hands of an unhappy episcopate and clergy.

Older English law was not, moreover, uniformly supportive of the power of English monarchs—especially considering the kind of monarchs that the English kings had become by the late twelfth century. Almost all of the older treatises portray laws as the product of the older style consultative kingship that was still the standard in the twelfth century, a kingship which placed the king under the law. Henry II's courtiers, on the other hand, were inclined to think of the king's relationship to the law in Roman terms, in which the will of the king was the law (Hall 1993, 1-3). Although perhaps outside the intentions of their authors, the post-Conquest treatises' traditional consultative picture would read in Henry and Becket's world as statements about the limitations of kingship. The *Leges Edwardi*, for example, borrows from Ado of Vienne's *Chronicle* the story of how the Carolingians, "not yet kings but princes," removed the last of the Merovingians with the approval and by the authority of the pope (ECf2, 17). This story offers no support of royal absolutism, but is a firm reminder of the role that the papacy and Church had played in king-making, at least as understood by the author.

Spurred by the conflict between Becket and Henry II, as well as by the overall changes the law was undergoing, these old codes were reworked with determination during the second half of the twelfth century—mostly in its last quarter and into the first decade of the thirteenth century. The earliest code to undergo revision was the *Leges Edwardi Confessoris*. By the 1170s, but possibly as early as the 1150s, a reviser had turned the *Leges Edwardi* into a more accessible text (with rubrics) and clarified the language throughout (O'Brien 1999a, 106). Few substantive changes were made to the legal sections, but some of the narrative chapters were enlarged significantly, including one that placed greater emphasis on the accomplishment of Edward the Confessor in finding the old and forgotten laws of Edgar. Where the original announced simply, "thus the laws of King Edward were authorized," the reviser elaborates: "Furthermore, from that day, with much authority, the laws of King Edward were honored throughout England and confirmed, corroborated, and observed before all the other laws of the kingdom" (ECf3, 34.1a). Instead of portraying these laws as having been abandoned (*dimissa*) under the Danes and then restored and confirmed by Edward, the revised version has the laws sleep and be revived, using four different verbs (ECf3, 34.3). These emphases and repetitions betray a seam that was coming undone, a bond between the legal present and past that was experiencing some strain and beginning, in the second half of the twelfth century, to give way.

The *Leges Edwardi* and the *Ten Articles of William I* were translated into French at some point during the reign of Richard I. Both texts were revised as well, and the *Leges Edwardi* was significantly rearranged and emended. The transformation, of course, concerned not only language, but also culture and probably audience. If the *Leges Edwardi* was first written for an episcopal household in the 1130s or 1140s, the later translation was intended for an audience with emended tastes. William I in the second version was only the son of Edward the Confessor's uncle, Robert (BCf2, 35.2), but in the new version, he walks out of the pages of contemporary *chansons*: he is "prudent and brave and strong and valiant and wise and courtly."³ But, of course, translation is often a re-robing of a source. Here, the last century's conqueror models his new twelfth-century wardrobe.

The grandest revision of older legal treatises and codes was done sometime in the early years of the thirteenth century, probably in London. This is the *Leges Anglorum*. There is a coeval manuscript—now in the John Rylands Library at the University of Manchester—which by script and contents comes from the first decade of the thirteenth century (Liebermann 1913, 732–45). Its latest texts date from 1197 and were the products of Richard I's chancery. After 1215, a new hand added the Magna Carta and a host of later texts. The author-compiler of the original collection, a Francophone with limited knowledge of English, appears to have written the *Leges Anglorum* for the London Guildhall. The collection is impressive for its sheer scale, regardless of the revisions the author made to the older treatises. It includes all of the Latin translations of Anglo-Saxon laws from *Quadripartitus*, almost all of the Norman era treatises and texts (*Leges Henrici Primi*, *Leges Edwardi Confessoris*, the *Ten Articles of William I*), and copies of London charters issued by kings (Liebermann 1894, v–viii). For the rulers after Stephen, it includes, interestingly, none of the controversial assizes of Henry II (let alone the Constitutions of Clarendon that so upset Becket and his clergy)—but instead coronation charters, other London charters, and the apocryphal treatise *Libertates civitatis Londoniarum* (Liberties of the City of London). This material is knit together by biography and chronology through its arrangement by king. Many kings receive short entries covering the dates or accomplishments of their reigns, which follow the laws they supposedly issued. The whole, then, takes on the appearance of a grand chronicle of laws.

The author-compiler was not content, however, with merely ordering his treatises by reign: he also edited them in striking ways. To get a sense of the extent of his revisions, it is useful to look at the *Leges Edwardi*, for which his interventions were the most frequent and radical. The revisions double the size of the original treatise. In the original, chapter 17 retold the story of how the pope authorized the deposition of the Merovingians and the succession of Pippin and Charles—that is, the founding of a new dynasty, the Carolingians. The original author deployed this familiar story to explain how even though kings were supposed to be vicars of God and ought to eradicate evildoers, they nevertheless had the power to pardon these evildoers (chapter 18). This story changes dramatically in the *Leges Anglorum*. Here, the author places the story earlier in the treatise

to fall between chapters on the Danegeld and the king's peace, and joins it to the account in Bede of how Pope Eleutherius laid down rules for good behavior in a letter to Lucius, king of the Britons. The new rubrics read "the law and related matters of the crown" and "the duty of the king," and the text articulates the principles that govern the behavior of kings:

The king by right ought to observe without diminution and defend completely and with all purity all lands and honors and all dignities and rights and liberties of the crown of this kingdom, and to recall into their former state and in the obligation of all men what rights of the kingdom have been scattered and torn down and lost . . . [The king] ought to preserve, nurture, maintain, and rule with all integrity and liberty the holy church of his kingdom according to the establishments of his ancestors and predecessors . . . [and] he ought to establish good laws and approved customs [and] eliminate wicked ones and abolish them wholly from the kingdom . . . The king ought to have three slaves: luxury, avarice, and desire; if he holds them enslaved, he shall rule well and famously in his kingdom. (BCf4 11.1 A7, 11.1 A8; Liebermann 1903, 635–36).

And so on. Not all of the third version of the *Leges Edwardi* attracted the editor's emending imagination; nevertheless, the revised *Leges Edwardi* became in this author-compiler's hands a treatise unmistakably, explicitly, and implicitly critical of the behavior of kings—and most likely one king in particular, King John, whom Gerald of Wales compared to "a robber permanently on the prowl, always probing, always searching for the weak spot where there is something for him to steal" (Gerald of Wales 1861–91, 8:316). The *Leges Edwardi* became, along with the revised form of the *Ten Articles* and various pieces of legal apocrypha, a vehicle for complaint and criticism of the monarch and a mirror of good behavior and bad, with law as the reflective material.

The appearance of Arthur in such a setting is unusual and new. There is no Arthurian law code; even Geoffrey of Monmouth did not fabricate one for him. Nor does Arthur make a cameo in earlier codes as one of the old kings acknowledged by current lawmakers. This absence is not surprising, given the late date at which the English and Anglo-Norman world learned about him. In the *Leges Anglorum*, he appears in three guises. First and foremost, Arthur is a conqueror. The first glimpse of this is in the narrative link with Athelstan, the tenth-century English king. The author-compiler claims that Athelstan ruled lands that Arthur had earlier established as belonging to the crown of Britain (Liebermann 1894, 22). The lands that Arthur added to his British empire are enumerated in the *Leges Anglorum*'s version of the *Leges Edwardi*. Here, the reader receives the list of countries and learns that Arthur—"a courageous knight"—had wanted more than the kingdom of Britain and therefore had "courageously subjugated with great speed" all of the lands between Spain and Russia. Next, Arthur appears as a legislator and king concerned with the administration of justice; it is Arthur's law requiring all nobles, knights, and freemen to become sworn brothers in defense of the land and their rights that lies asleep until Edgar wakens it again. Last, Arthur is a crusader long before there were any Crusades—in fact, before

there were any Muslims. He uses the power of this sworn brotherhood to expel the Sarracens from Britain (Liebermann 1903, 655-60).

Why has Arthur appeared in these different guises? Why has this been inserted into this collection of laws? Why was this interpolation created in the early years of the thirteenth century? The answers to these questions reach back to Geoffrey of Monmouth's great achievement in shaping a new past for Britain out of pieces of legend, a few actual chronicles, and his own mischievous imagination. In Geoffrey's *History of the Kings of Britain*, composed by 1138, Arthur stands as the centerpiece of the history of Britain from the coming of the Trojans under Brutus to the reign of Athelstan. Arthur is principally a warlord, leading his men in battle, fighting in a wild frenzy against the Saxons, invading and conquering Gaul and doling it out to his vassals, and fighting the Romans. He is the kind of king who engages in single combat with giants. He does occasionally take time out to make a law or administer justice in his empire. His most significant legal pronouncement, however, comes not in a law, per se, but in response to the Roman demands that Arthur turn himself in to the Senate as a criminal for having broken Roman law. Arthur responds by decreeing that the Romans pay him tribute, rather than paying them himself. For, as he says, "nothing that is acquired by force and violence can ever be held legally by anyone," an old legal maxim stretching back to Justinian. Mostly, however, Arthur summons assemblies and reaches agreement on policy with his bishops, archbishops, and nobles in preparation for war. Geoffrey's *Historia* was received by the English with accolades, and its narrative and kings slipped into some of the chronicle histories of his own day and thereafter. What criticism there was—from William de Newburgh in the late twelfth century—was drowned out by excitement over the discovery of such a valuable tale about Arthur and the Britons.

Geoffrey set in motion an escalation of Arthuriana in the latter half of the twelfth century. His *History* was translated by 1155 by the Anglo-Norman poet Wace, while Wace's *Roman de Brut* was itself translated and considerably expanded by the English-language writer called Lawman, most likely in the reign of John (1199-1216). Arthur also appears in the background of contemporary *lais* and other chivalric tales. His court and reign often frame the events of the legends, even if he does not play an active role. Arthur's world is the world in which Chrétien de Troyes set his romances. The king holds a court of appeal in the Norman writer Beroul's *Romance of Tristan*. He fights a giant in a digression in Thomas of Britain's *Tristan*. There is no need to detail the rise of the presence and magnetism of Arthur in the imaginative and historical literature of the twelfth century, however. The peak of this mania was surely reached at Glastonbury, where the actual bones of King Arthur were "discovered" and reinterred with fanfare in the 1190s (Gransden 1976).

What is important here is the observation that over the course of this century, Arthur was transformed in many texts from a warrior king to a justice-administering monarch, from fighter to judge. Why did this transformation occur? Wasn't Arthur busy enough conquering Scandinavia, the islands of

the North Atlantic, and Gaul, and fighting Saxons, giants, and Romans? Arthur, a medieval character in popular literature, served as a mirror to his readers. As Arthur aged in literary terms, however, he more and more conformed to the shape and attributes of the patrons who wanted to hear and read the legends about him. So Arthur was bound to change from a British warrior into something more. By the late twelfth century, that something more was a king who made law, settled his conquests with decrees, and worked through his court and the courts, and whose stature depended on his administration of justice. Is it all that surprising that in many ways Arthur came to resemble Henry II of England? This resemblance was not merely a reflection of the tastes of the royalty. The recognition went deeper down the ranks of society. As Bartlett recently observed, "a particular coloration borrowed from the legends and literature of Arthur and his knights had begun to tint the life of the English aristocracy" (Bartlett 2000, 251). The Arthur of the king and barons ruled a wide realm, including Britain, Gaul, Ireland, and Scotland at the core, just as Henry II and his sons ruled England, Ireland, Scotland, and a large part of the wider kingdom of France. Arthur fought his own wars; Henry II, Richard, and John knew battle. He laid down the law; the Angevins reshaped English law into what many would call the foundation of the Common Law. Their subjects thought they were too interested in the workings of justice—an especially common criticism of John.

The importance of Arthur in literature of all sorts, and even his transformation into a legislator and judge, does not fully explain his intrusion into the *Leges Anglorum*. England, after all, had law-giving kings whom it celebrated—Athelberht, Offa, Alfred, Edgar, Cnut, but most of all Edward the Confessor, whose name became associated in the generations after 1066 with the good old law of the Anglo-Saxon state, the laws that Norman kings needed to confirm and conform to in order to assure the stability of their rule. Why did Edward the Confessor need a somewhat distant predecessor—an Arthur? Three reasons come to mind, although there are likely more. First, Edward did not match the chivalric ideal that had become the standard of the twelfth century. On the contrary, he had been promoted from his death, and fervently from the 1130s, as a saintly king, wise, celibate, peace-loving, and holy. Anything like a martial quality is only barely visible through the screen of his sainthood. With his canonization in 1161, Edward ceased in some ways to dominate the imaginative memory of England's legal past (Barlow 1970, 256-85). Second, the *Leges Anglorum* provided an opening for a new legislator to be added in order to extend the list of England's ancient legislators; the opening appeared because the *Leges Edwardi* had taken from one of its sources, the third version of the *Leges Edwardi* the strange notion that laws can fall asleep and be reawakened years afterwards by later monarchs. The *Leges Edwardi* claims that Edgar's laws slept through Athelred's troubled reign, as well as the rule of the Danish kings, before being reawakened by Edward the Confessor and confirmed by William I (BCf3, 34.1b-34.3). How difficult was it for the author of the interpolations to make Arthur the creator of law that slept until Edgar woke it up? Through this connection, the chain of lawgivers was stretched back to incorporate the king that most late-twelfth-century aristocrats

and kings would consider their model. Last, the use of Arthur as the mouthpiece for some of the law in the *Leges Edwardi* portion of the *Leges Anglorum* fit the audience, if it is true that the whole collection was conceived as a criticism of King John. John was a reader of Arthurian romances and, like his brother, possessed a sword hallowed by its associations with the knights of Camelot: Tristan's own, as his brother Richard carried Arthur's Excalibur (Bartlett 2000, 251). Here was a king who might value what Arthur said.

So a legal literature of complaint in England was born, a literature deriving its strength and attraction from the history of written law and the habits of royal promises, both of which the Norman Conquest and later political conflicts magnified and then calcified. Other European kingdoms at a later date returned to old law to criticize kings: the Aragonese demanded the restoration of the *Usatges*, their oldest written law-code, and the abolition of Roman law in the reign of Jaime I (Kagay 1994, 45), and the French asked for the return of the "law of St. Louis" in the crises of 1314-16 (Brown 1981). Laws that had begun their lives as authoritative pronouncements by the count-kings of Barcelona and the king of France now were handled by opponents of royal prerogative in the same way that authoritative statements of old English *laga* were wielded by both Henry II's and John's barons. But the English laws hold a different place in their polity. The law occupied a much grander place in the minds of opponents, perhaps because, as Susan Reynolds points out, tyranny seemed so much more likely to occur in England than elsewhere, and kings, like their opponents, drew from the same stream of inspiration and continued to express their own ideals in legal texts (Reynolds 1997, 51). The literature of complaint did not end with the recopying of older laws, especially the *Leges Anglorum*, during the crises of the thirteenth, fourteenth, and fifteenth centuries, but continued in new treatises that projected themselves back into the world of the *laga Edwardi* and, by so doing, gained both authority and readers: the *Modus tenendi Parliamentum* and *Mirror of Justices* belong to this genre (Whittaker 1895; Pronay and Taylor 1980).

But it was not just a literature of complaint that had been created. It was also a political identity derived from a new origin (Kumar 2003, 62-66). England's early legal history—so important to the first generation of Normans—had been metamorphosed by a new political context, the Angevin Empire. The late twelfth-century baronage and its kings inhabited an altered mental world, and the laws of their predecessors proved malleable for their Arthurian imaginations. The *Leges Anglorum* may tell us about the development of the ideas behind the Magna Carta, as Holt has argued, and it certainly tells us about the thought world inhabited by the barons—both John's supporters and opponents (Holt 1992, 56). What bound these groups together was more important than any mere history of English law that had been crafted.

Although the consequences of this use of old law in situations of political dissent are at times difficult to disentangle from other aspects of English political life and constitutional struggles, a few observations may at least illuminate the knot in greater detail. If a kingdom or a people was defined in the Middle Ages by its possession of a single law, then any dis-

pute about the content of that law becomes primarily a problem of political identity. How much would Henry II have sensed this reality in his dispute with Becket over the laws? How much would the legal shapelessness of his "empire" have heightened his awareness of his need to control the law, to create a common law? That such questions about political identity and the old law might find common ground in their answers is suggested by the fact that the London creator of the *Leges Anglorum* borrowed most heavily from Geoffrey of Monmouth's *Historia regum Britannie* for his interpolations; Reynolds has suggested that one of the many reasons for the popularity of this history was "that its glorification of a British past transcended the uncomfortable division between Normans and English" (Reynolds 1997, 267). By the time of the Angevins, the *History* had erased the legal differences not only between the Normans and English, but also between Angevins, Normans, Bretons, Manceaux, Poitevins, Scots, Irish, Welsh, and English. This was a new myth for a new age.

The implications of the use of legal literature against the crown go beyond Angevin constitutional struggles. The imaginative memory of the chivalric classes may stand with the Magna Carta at the center of the development of English constitutional thought, where Common Law principles and ancient codes of law were used to manipulate and restrain sovereigns. The furious copying of the *Leges Anglorum* in fourteenth-century London may have been immediately concerned with the goal of getting the city's liberties reconfirmed by Edward II, but these texts had potency because, by then, they were accepted as defining the political relationship between ruler and ruled (Catto 1981, 370-72, 387). And, furthermore, the myth of the English constitution for seventeenth-century critics of royal absolutism was a myth deeply rooted in the old law, in Anglo-Saxon dooms, Anglo-Norman treatises, and the Magna Carta, not just because these critics recognized that the common law was in fact laden with principles that contributed to the establishment of their parliamentary government, but also because the imaginations of the English were accustomed, through generations of practice, to run along these lines and inclined to seek out the frame for complaint and identity in such older legal literature. ¹³

NOTES

1. ECf4 represents the last, or London, recension of the *Leges Edwardi Confessoris*, which was one of several legal texts gathered to create the *Leges Anglorum*. In this article, ECf1 refers to the earliest version of the *Leges Edwardi*; ECf2 to the second, and ECf3 to the third version; which itself became the basis for ECf4. ECf1 and ECf2 are available in O'Brien 1999a, 158-203. ECf3 and ECf4 are in Liebermann 1903, 1: 627-72. *Leges Angli* refers to the complete text of the *Leges Anglorum*, but will only be used for citation to texts other than ECf4. All citations are to chapters and sub-chapters as found in O'Brien 1999a and Liebermann 1903 for ECf1-4; citations to *Leges Angli* are to chapters and sub-chapters in Liebermann 1894.
2. The most important of these legal encyclopedias, *Textus Roffensis*, has been reproduced in black and white, edited by Peter Sawyer for the Early English Manuscripts in Facsimile. The Medway Archives Office has placed color images of all of its folios online at <http://cityack.medway.gov.uk/>.
3. This text is currently available only in its sole manuscript copy, a thirteenth-century Luffield priory book, now Cambridge University Library, MS Ee. 11.

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With a Little Help from a Friend: Habeas Corpus and the Magna Carta after Runnymede

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At the beginning of the twentieth century, Charles McIlwain observed that the new histories of the Magna Carta were portraying the charter as a "document of reaction" that could only fulfill its purported greatness "when men [were] no longer able to understand its real meaning" (McIlwain 1914, 46). Characteristic of these early-twentieth-century writers was Edward Jenks, who, in his 1904 article "The Myth of Magna Carta," came to the conclusion that the real beneficiaries of the document—the *liber homo* of Article 39—were not "the people" we traditionally imagine, but rather an "aristocratic class . . . who can no more be ranked amongst the people, than the country gentleman of to-day" (Jenks 1904, 269). Although Jenks's position is often criticized as extreme, it is nevertheless the case that virtually all of the Magna Carta's modern commentators recognize vast historical inaccuracies in the Whiggish accounts of the charter's development up until the late nineteenth century (Radin 1946; Reid 1993; Halliday 2010, 15–16).¹ What these new revisionist histories suggested was that the Magna Carta's great provisions—due process and trial by jury—only became great when, forgetting or ignoring the charter's seemingly lackluster beginnings, generations subsequent to 1215 gave them new meaning.

But despite the Magna Carta's admittedly feudal origins, we continue to regard the charter as the foundational expression of modern constitutionalism. What this suggests, then, is that as we attempt to make sense of the Magna Carta, we should begin not *at* Runnymede, but *after* it, accounting along the way for other political and legal developments that helped facilitate the charter's transformation into its elevated position in the Western legal tradition. When we do, we quickly discover that the Magna Carta had a little help along the way.

HABEAS CORPUS AND THE MAGNA CARTA

One of the most effective tools used to enforce subsequent reinterpretations of the substantive core of the Magna Carta's procedural provisions was the writ of habeas corpus. This writ has been so intertwined with our understanding of the Magna Carta that in both Coke's *Institutes* and Blackstone's *Commentaries*, it is portrayed in the same lofty terms as the charter itself, as "the great and efficacious writ" that serves to free those who may be "taken, or committed to prison *contra legem terrae*, against the Law of the land" (Blackstone and Tucker 1803, 131). Reborn together in the early seventeenth century during the battles between the Common Law and Chancery courts of James I, habeas corpus henceforth served as the pre-

ferred legal mechanism to enforce substantive readings of the Magna Carta's *legem terrae*—now read as "due process"—provision of Article 39 (Corwin 1928; Duker 1980; Halliday 2010, 15–16). By the eighteenth century, Blackstone felt confident enough to assert that habeas corpus was now "another Magna Carta" (Blackstone and Tucker 1803, 131; Nutting 1960; Meador 1966).

But like the great charter that it came to enforce, the origins of habeas corpus suggest that the writ was not always deserving of its modern encomiums. The first recorded appearance of habeas corpus was, in fact, in 1199, predating the Magna Carta by 16 years. Originally part of the *mesne* process of early legal adjudication, the writ was widely used to ensure the presence of parties in court (Cohen 1938; Duker 1980). In the fifteenth century, a distant variant of modern habeas corpus appeared as the King's Chancery courts began to use habeas corpus, along with writs of certiorari, to remove cases from inferior courts into their own. Hardly concerned with the vindication of individual rights or issues of due process as we understand them today, this *cum causa* version of habeas corpus served to enforce the privilege of certain classes, such as "clergy, members of Parliament, ministers of the King, and officers of superior courts," to enjoy legal proceedings in more sympathetic jurisdictions (Meador 1966, 11).

Increasingly, permutations of habeas corpus developed throughout the sixteenth century that allowed the writ to be used in criminal matters to discharge prisoners if they were held unlawfully (Meador 1966).² And with the constitutional crises of the early seventeenth century, habeas corpus' prior use both as a tool in jurisdictional conflicts and as a developing legal challenge to unlawful imprisonment quickly set it against monarchical power.

In *Darnel's Case* in particular, both the Magna Carta and habeas corpus were partially reinvented, with habeas corpus now explicitly enforcing a more capacious reading of the Magna Carta's *legem terrae* (Halliday 2010, 137–39).³ Imprisoned by the Privy Council for failure to pay the king's tax through forced loans, Darnel petitioned the King's Bench for a writ of habeas corpus challenging the jurisdiction of the Council to hold him. The Crown's response to the writ, however, stated that Darnel was being held "*per speciale mandatum Domini Regis*," and not as the result of indictment or other established common law legal processes. Darnel argued that habeas corpus served to "return the cause of the imprisonment, that it may be examined in this court." Although a return was made and a cause provided, substantively, there

was "no cause at all expressed in it." John Selden, one of Darnel's counsels, contended further that the king's return violated Article 39's *per legem terrae* provision by imprisoning subjects without "presentment or by indictment." He then went on to argue that if "*per speciale mandatum* be within the meaning of these words ... then this act has done nothing" (Meador 1966, 15).

Hardly concerned with the vindication of individual rights or issues of due process as we understand them today, this cum causa version of habeas corpus served to enforce the privilege of certain classes, such as "clergy, members of Parliament, ministers of the King, and officers of superior courts," to enjoy legal proceedings in more sympathetic jurisdictions.

In response, Sir Robert Heath, who argued the Crown's position in the case, agreed that the "fundamental grounds of argument upon this case begins with Magna Carta," but he argued that the substantive meaning of the *legem terrae* provision certainly encompassed any command of the King. The King's cause, while not "expressed," was simply not yet "ripe," and the "judicature have ever rested satisfied therewith ... if a man be committed by the commandment of the king, he is not to be delivered by a Habeas Corpus in this court, for we know not the cause of the commitment." Although Darnel was ultimately unsuccessful, the very suggestion that habeas corpus was the natural guarantor of Magna Carta's *legem terrae* provision, along with the increasingly popular assertion that the King's prerogative was no part of the *legem terrae*, were salient developments (Meador 1966, 13-15).⁴

The next year, in 1628, Parliament passed the Petition of Right. In the Commons, a version of the Petition was put forward that specifically allowed habeas corpus to challenge detentions (especially by the Crown) that lacked a specific cause of commitment, thus attacking the Darnel decision directly. Leading the debate in Parliament was Sir Edward Coke, who, at the same time, was completing his *Institutes on the Law of England*. Coke's section on Article 39's *Nisi per legem terrae* clause not only read it as "without due process of law," but further asserted that due process simply meant the "Common Law." Tellingly, he then asked, "what remedy hath a party grieved" under due process to rectify false imprisonment? Coke's answer, in two clauses in this section, was "habeas corpus" (Meador 1966, 16-17; Halliday 2010, 137-39).

With habeas corpus' role as the preferred enforcement mechanism for the Magna Carta's *legem terrae* provision asserted by Coke, the writ received further imprimatur in the Habeas Corpus Act of 1679.⁵ The 1679 Act, however, was not the palladium of liberties that some, like Blackstone, would later assert. Although the Act decreased time limitations in returns to the writ, allowed individual judges—not just full courts—to issue the writ during vacation, and sought to prohibit transfers of prisoners out of the realm to avoid the writ's reach, it also contained limitations to the writ that seem inim-

ical to modern sensibilities. Significantly, although the Act was limited to criminal detentions, it excepted from its protections those people detained for "felony or treason plainly expressed in the warrant of commitment or in execution by legal process," and it did not allow the release of prisoners completely unless the writ challenged the timeliness of an indictment (Oaks 1964; Halliday 2010, 237-46). What the Act

did suggest, though, was that the substantive content of the *legem terrae*, now enforced through habeas corpus, was primarily aimed at correcting the arbitrary nature of royal prerogative, and not providing a wider set of personal rights.

HABEAS CORPUS AND THE MAGNA CARTA IN THE NEW WORLD

The fusion of the Magna Carta's *legem terrae* and the writ of habeas corpus would, of course, make its way into the nascent American colonies, initially through Coke and then primarily through Blackstone, who, in his *Commentaries*, proclaimed that the Habeas Corpus Act of 1679 was "another *magna carta*." (Blackstone and Tucker 1803, 135; see also Stoner 1992, 21). Blackstone asserted that the "glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful." As a "natural inherent right" that is "established on the firmest basis by the provisions of *magna carta*," it is best supported and defended by "habeas corpus" (Blackstone and Tucker 1803, 135). But even before Blackstone, and as early as the 1680s, Massachusetts, New York, and Pennsylvania attempted to guarantee the writ modeled on the provisions of the 1679 Act, but these measures were summarily annulled by the Privy Council. In the first few decades of the eighteenth century, royal governors in Virginia, North Carolina, and South Carolina provided for the writ through proclamation, not statute (Oaks 1964).

But in *Federalist #84*, Alexander Hamilton seemed to suggest that habeas corpus, now enumerated in the proposed Constitution, brought within its protection our most fundamental rights, and did so in a more effective manner than would a Bill of Rights or even the Magna Carta itself.⁶ For Hamilton, the protection of fundamental rights was already secured more fully in the Constitution as it stood with no amendments than if specific rights were enumerated. Along with the prohibitions against *ex post facto* laws, bills of attainder, and grants of nobility, Hamilton proposed that the habeas corpus clause in Article 1 was the primary defense against arbitrary arrests and imprisonments, which, in his words, were the "favorite and most formidable instruments

of tyranny" (Alexander 2003, 522). Mere parchment barriers, according to Hamilton, such as those that would eventually be enumerated in the first eight amendments, could never be as powerful in guaranteeing individual liberty as the simple protection of habeas corpus. Hamilton then went on to distinguish the rights guaranteed in the unamended Constitution from "bills of rights" more generally, which he considered to be simply "stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the Barons, sword in hand, from king John" (Hamilton et al. 2003, 523). Here, then, habeas corpus further assumed the burden of the Magna Carta's *legem terrae* provision through a Whiggish fiction, allowing the Great Writ of Liberty to become a fundamental guarantor of due process in the Constitution.

To be sure, our modern notion of habeas corpus as a remedy that, in the words of Justice Oliver Wendell Holmes, can "cut through all forms and go . . . to the very tissue" of unconstitutional detention, never crossed the minds of Selden, Coke, or Blackstone (*Frank v. Mangum* 1915). Important limitations, modeled on the 1679 Act, would continue to constrain both habeas corpus' procedural reach and the set of substantive rights that the writ was now imagined to protect in the United States. Like the Magna Carta before, habeas corpus' power was only ever as large and far-reaching as contemporary notions of due process allowed. Like the Privy Council's acceptance of the King's *speciale mandatum* as consistent with the *legem terrae*, habeas corpus would also reflect the limits of substantive rights and legitimate governmental processes.

In antebellum America, for example, habeas corpus was used to enforce substantive rights and limit governmental procedural abuses on both the state and national levels, but what exactly constituted due process was widely divergent. Moreover, procedural limitations to the writ all but prevented national courts from removing cases from state jurisdictions into their own. These limitations in part spurred the development of habeas corpus, as this concept was used in some southern states to vindicate asserted due process rights of slaveholders when their "property" absconded or was stolen. Some northern states, on the other hand, advanced a more capacious notion of due process and aggressively used habeas corpus to thwart the enforcement of the Fugitive Slave Clause of the Constitution (Oaks 1964; Morris 1974; Duker 1980).

Certainly, the Civil War seemed to redefine some fundamental rights, and, as would be expected, habeas corpus was similarly redefined, both in its procedural reach and in its substantive application, to enforce these rights. Beginning in the first half of the twentieth century, habeas corpus slowly developed into a legal remedy for any due process violation. Covering a catalogue of fundamental rights wider than the Magna Carta ever promised, Zechariah Chafee proclaimed that habeas corpus' substantive reach now included:

[T]he right to be accused by a grand jury, to be immune from double jeopardy, not to be deprived of liberty without due process of law, to a speedy and public trial by a jury of the vicinage,

to be informed of the nature of the accusation, to be confronted with the witnesses against him, to call his own witnesses and have his own lawyer. (Chafee 1952)

ANOTHER MAGNA CARTA

In *Fay v. Noia* (1963), at the apex of the Supreme Court's liberalization of habeas corpus during the 1960s, Justice Brennan said of modern encomiums for the writ:

These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. (*Fay v. Noia* 1963)

Perpetuating the myth of habeas corpus' progressive development as much as anyone before him, Brennan then asserted that as early as the sixteenth century, habeas corpus simply "prefigured the union of the right to due process drawn from Magna Charta" (*Fay v. Noia* 1963).

What, then, are we to make of the historically inaccurate accounts of the Magna Carta and habeas corpus? One profitable way might be to treat Blackstone's assertion of habeas corpus as "another Magna Carta" not as an account of origins for either the Magna Carta or habeas corpus, but rather as an account of their capacity to develop and change over time. Blackstone's attribution of habeas corpus' new role as successor to the Magna Carta could easily be questioned and then summarily rejected as nothing more than what Alfred Kelly called "law office history," whereby lawyers pick and choose facts that construct a supposedly inevitable narrative purely in the service of their own position (Kelly 1965). Certainly accounts of both the Magna Carta and habeas corpus fall prey to this vice, as the substantive rights of the barons that the Great Charter most likely sought to protect—like the substantive "rights" of slaveowners that habeas corpus was used to protect—are too often ignored.

Nevertheless, the very fact that the substantive and procedural due process rights that both the Magna Carta and habeas corpus have protected through the centuries have varied considerably—even in negative directions—is proof enough of their liberty-regarding potential. In this sense, our acceptance of less than accurate histories is, at the very least, testament to our normative preference for more capacious notions of personal rights and liberties.

In his 1914 article critiquing Whiggish accounts of Magna Carta, Charles McIlwain came to the conclusion that while some modern rights, like trial by jury, were never implied in the document in the way that we imagine today, "we may still hold, as our fathers did, that the law of the land is there" (McIlwain 1914, 51). Intentional or not, then, the wisdom of the barons who managed to secure feudal rights at Runnymede

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was present in the framing of procedural rights—like *legem terrae*—that were specific enough to protect their most immediate substantive concerns but, fortuitously, general enough to remind us that there is still work left to be done. ■

NOTES

1. On Whiggish accounts of history more generally, see Butterfield (1931).
2. Some scholars argue that habeas corpus' mistaken link to the Magna Carta was perpetuated further by a misunderstanding of Chapter 36 relating to the writ of inquisition, or the writ *de adla et atia* (Cohen 1938). People detained for murder could obtain pretrial release through the writ if they could prove that their accuser acted out of "spite and hate." The Magna Carta's guarantee of this writ was most likely the result of the fact that King John began to charge for the writ (Meador 1966).
3. *Darnel's Case* is also referred to as the *Five Knights Case*, 3 State Trials 1 (1627).
4. According to Meador (1966), the difficulty here for the Privy Council was that in using habeas corpus to look behind a simple procedural return of the writ and examine its substantive basis, the King's judges were put in the unenviable position of questioning the King's order themselves.
5. Before the 1679 Act, the Habeas Corpus Act of 1641 effectively abolished the Star Chamber (see Cohen 1938). For an excellent overview of the rather curious legislative history of the 1679 Act, see Nutting (1960).
6. Article I, section 9, provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

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Slavery and the Magna Carta in the Development of Anglo-American Constitutionalism

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If English and American constitutional thought rests on one shared foundation, it is the principle that executive power, in order to be legitimate, must be subject to law. In the thirteenth century, the English jurist Henry de Bracton declared that “the law makes the King”—rather than the King makes the law—and urged, “Let the King . . . bestow upon the law what the law bestows upon him, namely dominion and power, for there is no King where will rules and not law” (White 1908, 268). Bracton no doubt had in mind some of the recent provisions of the Magna Carta (1215), which provided a formal codification of this principle. The rebel barons who imposed the Magna Carta on King John were animated by a desire to limit arbitrary executive power, and, in Article 39, they secured a promise from the monarchy that “no free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land” (Turner 2003, 231). In the fourteenth century, Article 39 was redrafted by Parliament to apply not only to free men but also to any man “of whatever estate or condition he may be,” and this process of reinterpretation continued throughout the next several centuries as Parliament expanded “the Charter’s special ‘liberties’ for the privileged classes to general guarantees of ‘liberty’ for all the king’s subjects” (Turner 2003, 3).

The principle that a person ought not be “in any way victimised . . . except by the lawful judgment of his peers or by the law of the land” was given legal force in the common law through the writ of habeas corpus, which allowed an individual to challenge the grounds of his detention or molestation. As Bailyn notes, moreover, the American “colonists’ attitude to the whole world of politics and government was fundamentally shaped by the root assumption that they, as Brits, shared in a unique inheritance of liberty” (Bailyn 1967, 67). As such, the Charter’s principle of individual liberty was so well enshrined in the canons of jurisprudence operating in the American colonies that the U.S. Constitution of 1787 simply assumed that the principle was operative in the newly created federal regime as well. Article 1 of the Constitution provided that “the privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” and, in a concession to the Anti-Federalists, the Fifth Amendment succinctly reiterated the principle behind habeas corpus review: “No person . . . shall be deprived of life, liberty, or property without due process of law.”

NATURAL RIGHTS AND THE RIGHTS OF ENGLISHMEN

One jurisprudential and philosophical question implicated by the common law tradition was whether the protections and privileges associated with the Magna Carta were conventional rights inhering in Englishmen *qua* Englishmen, or whether they were natural rights owed by virtue of a common humanity. The rise of a tradition of antislavery constitutional thought in the Anglo-American world was the result of a theoretical fusion of these claims to natural and historic rights. It was the natural right of all men, in other words, to be free from arbitrary exercises of power while the particular constitutional structure was, in fact, founded to secure and protect this natural right. In the phraseology of Blackstone—read perhaps as much in America as in England—“the principal aim of society [was] to protect individuals in the enjoyment of those absolute rights, which were invested in them by the immutable laws of nature,” and such rights, “founded on nature and reason,” were “coeval with [the English] form of government” (Blackstone 1899, 63).

In the late eighteenth century, antislavery activists in England adopted this theoretical framework to begin a two-pronged assault on colonial slavery, claiming that it was both contrary to natural law and repugnant to the English Constitution. In an early abolitionist tract, Granville Sharp argued in this vein that slavery was a “gross infringement of the common and natural rights of mankind” and was “plainly contrary to the laws and constitution of this kingdom” (Sharp 1769, 40–41). Sharp’s invocation of the English Constitution as a bulwark against slavery rested primarily on the principles of the Magna Carta, and the practical viability of Sharp’s argument was soon tested when he helped to mount a legal challenge to the detention, in England, of a Virginia-born plantation slave named James Somerset. In the pivotal case of *Somerset v. Stewart* (1772), the English judge William Murray, Lord Mansfield, then asserted from the bench that the nature of slavery was “so odious . . . [that] nothing could be suffered to support it but positive law.” As Somerset’s treatment could be approved neither by the laws of nature nor by the laws of England, Mansfield declared, moreover, that “the black must be discharged” (*Somerset v. Stewart* 1772, 19).

Although the *Somerset* judgment was limited in its scope and application, the idea that slavery was contrary both to natural law and English common law was influential in the development of American antislavery constitutionalism. The guarantee of due process of law in the Constitution’s Fifth Amendment was, as Joseph Story argued, “but an enlarge-

ment of the language of Magna Charta . . . So that this clause, in effect, affirm [ed] the right of trial according to process and proceedings of common law" (Story 1873, 537). But what exactly did it mean that no *person* should be deprived of his liberty without due process of law? Were persons who were being claimed or held as slaves entitled to such legal procedures, and might they, in fact, challenge the grounds of their detention in American courts?

Because of the federal character of the American Constitution (and the jurisdictional limitations on the national courts in Article 3), controversies regarding slavery were largely decided under the laws of the individual states. Nonetheless, for the few slavery-related cases that were taken up by the Supreme Court in the antebellum period, jurists were divided regarding the extent or even existence of legal protections for alleged slaves. The proposition that slavery was contrary to the law of nature was, as Chief Justice John Marshall conceded, "scarcely to be denied" (*The Antelope* 1825, 120). But whether foreign or domestic slaves could present claims to the federal judiciary for legal redress was a more difficult question. For one thing, the constitutional document crafted in Philadelphia was replete with concessions to the delegates from South Carolina and Georgia, who insisted that there would be no union if their "peculiar institution" were left to the whims of the national government. The most obvious concessions to the slave interest included a representation scheme that counted each slave as three-fifths of a person (Article 1§2), a guarantee that the African slave-trade would not be federally proscribed for a period of twenty years (Article 1§9), and a provision calling for the interstate return of fugitive slaves (Article 4§2).

In the case of *The Antelope*, Spanish and Portuguese governments had petitioned the Court for the return of slaves that were illegally imported into the United States. Such a request brought up difficult questions of international law and international relations in addition to basic constitutional considerations. In his argument before the Court, however, U.S. Attorney General William Wirt made his case for the freedom of the slaves, in part by asking the judges to consider that the "Africans stand before the Court as if brought up upon a habeas corpus" (*The Antelope* 1825, 108). The protections of habeas corpus, in other words, ought not to be limited to subjects of the English Crown or citizens of the United States, and the very logic of habeas corpus review would demand that the Court examine the grounds and legitimacy of each individual detention. Although the Court ultimately declined to entertain the *Antelope* Africans' individual claims to liberty (approving instead a lottery system that returned a proportion of the slaves to Spain and Portugal), controversy over the legal rights of alleged slaves did not soon subside.

PRIGG, HABEAS CORPUS, AND FUGITIVES FROM LABOR

Indeed, one of the most contentious constitutional questions involved issues related to the Constitution's ambiguously worded Fugitive Slave Clause, which stipulated that any "person held to Service or Labour in one State" must be "delivered up on Claim of the Party to whom such Service or Labour may be due." But whether it was a state or federal function to deliver

up the fugitive, and whether state laws protecting black citizens against kidnapping were unconstitutional preemptions of federal law, were not made explicit by the text. These became particularly thorny issues for Joseph Story, who, despite his own antislavery inclinations, provided far-reaching protections to slave catchers in his decision in *Prigg v. Pennsylvania* (1842). In the mid-1820s, the state of Pennsylvania had passed a statute which "provided that if any person shall, by force and violence, take and carry away . . . any negro or mulatto from any part of the Commonwealth," then such person would be guilty of felony kidnapping (*Prigg v. Pennsylvania* 1842, 543). After being indicted in Pennsylvania under the statute for forcibly carrying a runaway slave and her children back to Maryland, the slave catcher Edward Prigg initiated a suit against the state of Pennsylvania.

Story wrote a self-styled pragmatic opinion for the Court, declaring that "no uniform rule of interpretation" could be applied to the Fugitive Slave Clause that did not attain the ends for which it was written. And it was historically "well known," Story insisted, that the clause was written "to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State in the Union into which they might escape from the State where they were held in servitude." The judicial interpretation, then, had to reflect that historical reality, and the Constitution guaranteed a "positive unqualified right on the part of the owner of the slave which no state law or regulation can in any way qualify, regulate, control, or restrain." As the national government was "clothed with the appropriate authority and functions to enforce it," moreover, federal law necessarily superseded any state law to the contrary (*Prigg v. Pennsylvania* 1842, 611).

In an odd way, Story paid homage to the antislavery tradition, citing the principle posited in *Somerset*—that the "state of slavery is deemed to be a mere municipal regulation" contrary to natural law—as the *reason* why the fugitive slave clause was historically necessary (*Prigg v. Pennsylvania* 1842, 611). For

if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters—a course which would have created the most bitter animosities and engendered perpetual strife between the different States (612).

By this reasoning, a practice contrary to natural law was sanctioned and protected in order to secure the Constitution's very existence. The act by the Pennsylvania legislature, Story argued, was thus "unconstitutional and void," because it purported "to punish as a public offense against the State the very act of seizing and removing a slave by his master which the Constitution of the United States was designed to justify and uphold" (626–27).

There were, however, other avenues open to Story in his construction of the constitutional principles. John McLean, for instance, dissented from Story's opinion, arguing that there was "no conflict between the law of the state and the law of Congress" written to enforce the Fugitive Slave Clause (*Prigg v. Pennsylvania* 1842, 669). The alleged runaway slave, McLean

noted, was found "in a State where every man, black or white, is presumed to be free, and this State, to preserve the peace of its citizens, and its soil and jurisdiction from acts of violence, has prohibited the forcible abduction of persons of color" (671). On its face, the state statute did "not include slaves, as every man within the State is presumed to be free, and there is no provision in the act which embraces slaves" (671). If, after an alleged slave had been brought before a federal judicial officer and determined to owe service or labor to a citizen of another state under the laws of another state, then the federal remedy would stand. But, McLean insisted, such a remedy was not inconsistent with state protections against arbitrary force.

The constitutional question, for McLean, hinged on the protections of habeas corpus. Although the Constitution protected the claim of a person to whom labor or services were due, McLean insisted that the legality of such a claim had to be proved. The logic that would allow the seizure of any alleged slave, without legal redress, would provide a pretext for every man to "carry off any one whom he may choose to single out as his fugitive from labor"—a "most unheard of violation of the true spirit and meaning of the whole of [the Constitution]." Under this "most monstrous assumption of power," McLean then asked, where would be "our boasted freedom?" The Ohio jurist insisted, moreover, that the chief evidence for his interpretation of the "true spirit and meaning" of the Constitution as one that was meant to limit and prevent the exercise of arbitrary force was in the manner in which the framers "carefully guarded the writ of habeas corpus" in Article 1 and then reiterated, in the Constitution's early amendments, that one ought not be "deprived of liberty, without due process of law." Additionally, McLean carefully untangled the general principles behind habeas corpus review from the racial overtones present in this case. Residents in Philadelphia—black as well as white—were presumed to be free. Suppose, then, that a state prisoner—"not a negro"—wanted for labor or service was kidnapped in circumstances similar to those at issue in this case. "Under [the Court's] construction," McLean asserted, "you cannot try the question; and a free citizen goes promptly and without redress into slavery!" (*Prigg v. Pennsylvania* 1842, 576-78).

In light of McLean's dissent, which tried, at a minimum, to ameliorate the severity of the constitutional remedy provided to masters for the reclamation of fugitive slaves, Story's opinion for the majority was notable for its unbending affirmation of the absolute right of a master to seize and recapture his slave and its assertion that state laws against kidnapping blacks and carrying them across state lines were therefore unconstitutional. The severity of Story's opinion is also puzzling, given his previous assertion that the "existence of slavery, under any shape," was "so repugnant to the natural rights of man and the dictates of justice, that it seem[ed] difficult to find for it any adequate justification" (Story 1835, 358). Nor is there reason to suppose that Story's estimate of the evils of slavery had changed by the time *Prigg* was decided. On the contrary, according to Story's son, the eminent jurist considered his opinion in *Prigg* to be a great "triumph of freedom." But a triumph of freedom in what sense? The younger Story suggested that his father's opinion promoted the cause of liberty principally in

two ways: (1) by resting power over fugitive slaves exclusively in the hands of the "whole people" (i.e., the federal government) rather than a section of the people (i.e., state governments), it allowed Congress to "remodel the law and establish ... a legislation in favor of freedom" (Story 1851, 392); and (2) by limiting the national constitutional protections (as opposed to municipal or local protections) for slavery only to masters of runaway slaves, it implied that "the authority of a master does not extend to those whom he voluntarily takes with him into a free State where slavery is prohibited" (398-400).

DRED SCOTT, DUE PROCESS, AND THE LEGACY OF THE MAGNA CARTA

If the younger Story's explanation of his father's reasoning is sufficient, then the federal Fugitive Slave Law of 1850 and the *Dred Scott* decision of 1857 surely cast doubt on the extent to which Story's decision in *Prigg* was actually a boon to liberty. Granting exclusive claim to the federal legislature to implement the relevant constitutional provision certainly did not engender national legislation in "favor of freedom," and, as Lincoln maintained, the logic of Roger Taney's subsequent opinion in *Dred Scott* seemed to protect the rights of a master who took his slave voluntarily into free jurisdictions (Lincoln 1953, 24). Indeed, Chief Justice Taney's *Dred Scott* opinion provided the Court's most notorious statement on the constitutional status of slavery in the nineteenth century, and the case seemed to foreclose any constitutional protection or judicial remedy for African slaves and their descendants.

After traveling with his master to the free state of Illinois and the free territories north of Missouri, the slave Dred Scott sued for his own freedom, alleging that his residence in free jurisdictions effectively manumitted him from his former state of servitude. While examining the preliminary question of whether Scott was eligible to file suit in federal court, Taney asserted, in words that have become familiar, that at the time of the American Founding, members of that "unfortunate race"

had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. (*Dred Scott v. Sanford* 1857, 407)

This history of racial animosity and racial prejudice (though certainly lacking nuance) was evidence for Taney that the "negro race" was not "regarded as a portion of the people or citizens of the Government then formed" by the Constitution (411).

The practical result of Taney's historical excursion was the assertion that Scott could not be a citizen "within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts" (*Dred Scott v. Sanford* 1857, 406). Beyond the initial question of citizenship, however, Taney went on to argue further that the "right of property in a slave" was "distinctly and expressly affirmed in the Constitution." When considering the Fifth Amendment's procedural protections for life, liberty, and property, Taney

then asserted that an "act of Congress" depriving a man of slave property in the federal territories "could hardly be dignified with the name of due process of law" (450-51). There was, in other words, a substantive element to the due process clause, which explicitly insulated slave property from the reach of federal territorial legislation.

In their challenge to Taney's opinion, dissenters John McLean and Benjamin Curtis essentially contested the meaning and legacy of the constitutional heritage embodied in the Fifth Amendment. First, McLean disputed Taney's contention that slavery was distinctly and expressly affirmed in the Constitution, suggesting that "Madison, that great and good man . . . was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man" (*Dred Scott v. Sanford* 1857, 537). Citing Lord Chief Justice Mansfield's decision in *Somerset v. Stewart*, McLean then asserted that "property in a human being does not arise from nature or from the common law" but rather, as Story himself acknowledged in *Prigg*, was "a mere municipal regulation, founded upon and limited to the range of territorial laws" (549). Slavery was, as such, legal only under the laws of individual states and not by an explicit constitutional guarantee. Curtis, as well, brought the issue full circle by tying it back to the origin of the Fifth Amendment's Due Process Clause:

It must be remembered that this restriction on the legislative power [in the Fifth Amendment] is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta, was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the states, usually in the very words of that great charter. (626-27)

Yet prohibitions on slave property had been the subject of legislation in various states and, significantly, by the national government in the Northwest Ordinance of 1787. Cutting to the heart of the matter, McLean additionally insisted that the slave was, by his very nature, more than "mere chattel." Rather, he bore "the impress of his Maker, and [was] amenable to the laws of God and man, and he [was] destined to an endless existence" (550). According to McLean, there was a certain dignity about human nature that precluded a man from being a morally legitimate species of chattel. This was not an insignificant suggestion, and questions regarding what was owed to man simply by virtue of his humanity became the subject of national deliberation in the wake of the Court's decision.

After the constitutional breakdown that came on the heels of *Dred Scott v. Sanford*, the process of reinterpreting the mean-

ing of the Great Writ continued throughout the Civil War (beginning with Lincoln's decision to suspend its protections during wartime) and on to the Reconstruction Amendments, which altered the design of the federal Constitution by abolishing slavery and proscribing state (in addition to federal) deprivations of "life, liberty, and property" outside of legal protections and procedures afforded equally to all. There was in these discussions, moreover, a "chain of descent from Magna Carta through the medieval Parliaments to the nineteenth-century American anti-slavery movement and the origins of the due process and equal protection clauses of the Fourteenth Amendment" (Wiecek 1977, 26). In our own day as well, the task of reinterpreting the meaning and legacy of the Magna Carta continues as we balance the demands of national security with the claims of individual liberty, combat modern slavery and international sex trafficking within the confines of a fragile international order, and reexamine the extension and growth of the principles of freedom implicit in our constitutional tradition.²³

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The Legacy of the Magna Carta in Recent Supreme Court Decisions on Detainees' Rights

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The legacy of the Magna Carta is apparent in the Supreme Court's recent decisions regarding detainees' rights. Asked to evaluate strong claims of executive power, the Court has had occasion to consider the origin and scope of habeas corpus, which many scholars see as a product of the Magna Carta. The majority opinion in *Boumediene v. Bush* (2008) traced the history of the writ of habeas corpus back to the Magna Carta and relied on that lineage to rule that Guantanamo detainees were entitled to petition for habeas corpus, even though Congress had explicitly denied them that right in the 2006 Military Commissions Act (MCA) and the 2005 Detainee Treatment Act (DTA).

By holding that habeas corpus trumps statutory law, the Court affirmed the central place of the writ in our modern conception of individual liberty. At the same time, the Court itself (by allowing lower courts to hear and decide detainees' habeas petitions) has assumed a key role in protecting individual liberty when the political branches have been unwilling to do so. Thus, the Court's role in making the writ available works as a crucial counterforce against state power at a time when "national security" is used to justify secret detention, detention without criminal charges, and torture.

THE PRESIDENT AND THE SUPREME COURT IN THE "WAR ON TERROR": A BRIEF HISTORY

In the aftermath of the terrorist attacks of September 11, 2001, a struggle ensued between the Bush administration and the Supreme Court over the legal limits of state force applied in the administration's "war on terror." Each time the Court invalidated or restrained executive policies and practices, the administration sought ways to continue them. This history is worth reviewing briefly. Following September 11, the administration began detaining people suspected of being linked to terrorist organizations. Detention took place both within the United States and abroad, even though there were often no criminal charges pending or intended against the detainees. The first major test of this practice arose in the case of *Hamdi v. Rumsfeld* (2004), which reached the Supreme Court when Hamdi, a U.S. citizen, challenged his detention at Guantanamo Bay. The administration argued that they were authorized to detain Hamdi without charges for the duration of the war on terror, and that the Authorization for Use of Military Force, which Congress passed in September of 2001, furnished the legal authority for detention. The Court upheld Hamdi's detention, finding that the detention of persons seized

on the battlefield is incident to the waging of war. However, Justice O'Connor warned that "the state of war is not a blank check for the executive" (*Hamdi v. Rumsfeld* 2004, 535), and the Court required certain procedural protections to be afforded to detainees in Hamdi's position, including access to counsel and a status hearing to ensure their initial proper classification. Shortly thereafter, the Court decided that procedural protections specified by statute were applicable to detainees, including noncitizens, in *Rasul v. Bush*.

Following the decisions in *Hamdi* and *Rasul*, the administration sought to foreclose judicial review of detainee cases, and, to that end, they successfully lobbied Congress to pass the DTA. This act purported to strip the federal courts of jurisdiction to hear habeas corpus petitions brought by detainees. Of course, habeas relief was the only means available to many of the detainees for challenging their confinement—they could not use direct appeals because they had not been convicted or even charged with an offense, so they had nothing to appeal. Thus, the jurisdiction-stripping provisions of the DTA would close off detainees' access to the courts entirely.

In 2006, the DTA was challenged by a petitioner who actually had been charged with a series of offenses when his case of *Hamdan v. Rumsfeld* reached the Supreme Court. Hamdan had been slated to be tried by a military tribunal, and he argued that the tribunal in his case, which was constituted according to President Bush's military order of November 13, 2001, was unlawful. In *Hamdan*, the Supreme Court first found that the DTA did not preclude Hamdan's challenge, because that challenge had been lodged prior to the passage of the DTA. Turning to the merits of the case, the Court invalidated the military tribunals constituted by the president's 2001 order, finding them in violation of the Uniform Code of Military Justice, the Law of War, and the Geneva Conventions (*Hamdan v. Rumsfeld* 2006, 557, 622–34). In other words, the Court interpreted previously existing positive law to provide greater procedural rights for detainees than the executive was allowing them. However, President Bush sought to circumvent the *Hamdan* ruling by approaching Congress once again for new authorization to use military tribunals of the kind he had created in 2001. Late in 2006, before the Congress shifted to Democratic control, he obtained that approval. The MCA reauthorized the tribunals that the Court had invalidated earlier in the year.

In 2008, another Guantanamo detainee challenged the administration's claim that he was not entitled to habeas corpus. Bush administration lawyers argued in *Boumediene v. Bush*

that the petitioner was not entitled to habeas corpus for two reasons: because Guantanamo Bay was part of the sovereign nation of Cuba and therefore beyond the reach of the U.S. Constitution, and because the 2006 MCA foreclosed court review of detainee status. The Court rejected both of the administration's claims, noting that the Guantanamo facility was, in fact, under the control of the United States, and that habeas corpus could not be foreclosed without a specific and appropriate formal suspension of the writ by Congress in accordance with its Article I suspension power.

In *Boumediene*, the Court emphasized the importance of the writ of habeas corpus as a check on executive power. Writing for the Court, Justice Kennedy explained the Court's role in protecting petitioners against state force. "The test for determining the scope of this provision," he wrote, "must not be subject to manipulation by those whose power it is designed to restrain" (*Boumediene v. Bush* 2008, 2259). *Boumediene* proved to be the Court's last major ruling on detainee status and habeas corpus under President Bush.

Incoming president Barack Obama indicated almost immediately upon taking office that he would reverse Bush's policy on detention and either try or release the detainees. On January 22, 2009, Obama issued an executive order stating that the detention facility at Guantanamo Bay would be closed within one year, and that the Attorney General would coordinate a review of all Guantanamo detainees. The order also acknowledged that all detainees have the right to file a habeas corpus petition. This last provision was significant, because it showed that the new administration would not seek to contest or limit the *Boumediene* ruling.

HABEAS CORPUS AND THE MAGNA CARTA

The Supreme Court made the link between habeas corpus and Magna Carta explicit in its *Boumediene* opinion. Tracing the history of the writ back to the 1215 agreement between King John and his barons, the Court explained that the right to inquire into the basis of one's confinement is basic and fundamental to the rule of law. The Magna Carta "decreed that no man would be imprisoned contrary to the law of the land" (*Boumediene v. Bush* 2008, 2244). This general guarantee did not immediately function to guarantee individual liberty, however. First, it did not come with an enforcement mechanism, so executing the decree was problematic. Moreover, habeas corpus was at first typically used by the king to ask why one of his subjects was being detained; this is strikingly different from contemporary use, subject as it is to the inclinations of the monarch and augmenting rather than constraining his power (*Boumediene v. Bush* 2008, 2245). Gradually, however, habeas corpus was used to require the king himself to explain why he had detained a person. In *Boumediene*, the Supreme Court read the history of English law to say that "gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled" (2244).

The Court went on to point out that the framers of the U.S. Constitution did, in fact, include an express guarantee of habeas corpus in the Article I enumeration of legislative powers. As Justice Kennedy explained,

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system. (*Boumediene v. Bush* 2008, 2244)

Article I, Section 9, clause 2 of the U.S. Constitution states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In the DTA and MCA, Congress had not actually suspended the writ, but rather foreclosed its availability to a specific group of detainees. This was not a formal suspension. Moreover, the Court did not find the review proceedings that were intended to substitute for habeas relief to be an adequate substitute, and, consequently, the Guantanamo detainees were found to be protected by the Suspension Clause. In practical terms, the ruling meant that detainees were entitled to petition the federal courts for habeas corpus relief, which could lead to their release from confinement.

HABEAS CORPUS AS A META-PRINCIPLE

From 2004 to 2008, the Supreme Court invalidated, first, a military order of the president, then an interpretation of statutory language advanced by the executive, and finally an act of Congress itself. The rulings imposed a check on the executive and specifically vindicated habeas corpus as a limitation on the executive power to detain individuals during wartime. What should we make of this course of events? Of course, the Bush administration was sharply critical of the decisions that repudiated its antiterror policies and, more broadly, repudiated its executive authority. But this conflict between the Court and the other branches also raises a familiar yet fundamental question of democratic theory: does Supreme Court policymaking threaten the democratic process? By invalidating an act of Congress that was approved by a majority of lawmakers and signed into law by the president, the Court essentially substituted a minority view for the democratically enacted majority view. In so doing, were the unelected and unaccountable members of the Court endangering democratic values? Robert Dahl posed this problem a half-century ago, stating that "no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems" (1957, 283).

Dahl answered his own question by noting that an average of two justices are replaced during each presidential term, so that a one-term president (and certainly a two-term president) could expect to shape the Court over time to fit his preferences and, by extension, the preferences of the electorate (1957, 284). Moreover, Dahl analyzed the 86 decisions in which the Court actually had invalidated acts of Congress, and he concluded that despite that record, the Supreme Court did not act as a hindrance to the lawmaking majority. "It is an interesting and highly significant fact," Dahl concluded, "that

Congress and the president do generally succeed in overcoming a hostile Court on major policy issues" (288). Thus, for Dahl, the potential threat to democratic values had not actually materialized in the United States. In the "war on terror" decisions previously cited, however, it does appear that the Court effectively blocked the political branches on the "major policy issue" of detainee treatment. In short, Dahl's question remains and requires an answer today that addresses the developments of the past decade. Significantly, the complaints of executive overreach following September 11 were numerous, and those complaints have brought a greater urgency to questions concerning the tension between rights and democracy and the role of the Supreme Court in overturning democratically enacted law.

More recently, constitutional theorists have explored this problem from the perspective of legitimacy. In other words, when the Court does act to overturn provisions of positive law, how (if at all) can the action be considered legitimate? Upon what principle do such decisions rest? In his study of the jurisprudence of Justice William Brennan, Frank Michelman finds a tension in Justice Brennan's thought between a commitment to democracy and a commitment to individual rights. When determining whether to uphold a particular provision of law, Michelman suggests, Brennan and other justices must resort to a "law of lawmaking," or "constitutionalism," which Michelman defines as "a supervening law that stands beyond the reach of the politics it is meant to contain" (1998, 400). When judicial review leads the Court to overturn an act of Congress or the executive, it is the "law of lawmaking" that serves as a standard to guide judicial decision making and to evaluate the Court's decisional record in retrospect. Michelman perceives the following dilemma. A purely procedural jurisprudential standard would require a democratic determination at every decision-making level: in both the enactment of laws themselves and the interpretation of those laws in the context of disputes over their meaning. A procedure-independent jurisprudential standard, on the other hand (constitutionalism, or a "law of lawmaking"), would allow for determination of constitutional meaning, but might also shortchange the ideal of self-government in the sense that justices "undertake moral readings of constitutional texts in order to resolve for the country basic and contested issues of political morality" rather than allowing resolution of those issues through popular self-government alone (415).

If one starts from the assumption that legal rules must be democratically agreed-upon and enacted, then the ability of an independent institution like the Supreme Court to rule upon their validity via judicial review appears suspect in terms of democratic theory. But if rules are permitted that are not democratically agreed-upon and enacted, then the question of their legitimacy arises. According to Michelman, Justice Brennan confronted the rights and democracy tension during his time on the Supreme Court, and although the country was "gloriously well-served by Brennan's career," the conception of democracy evident in his work did not succeed in resolving the tension (1998, 399). Brennan saw the Court "as invested with authority and responsibility to interpret for the country a procedure-independent standard of right-

ness, justice, and democracy for its political regime" (426). Procedure-independent standards of interpretation might come from legal tradition, institutional practices that have crystallized over time, or some other source, but in any case, this understanding of what the Court does, in Michelman's view, cannot be considered the equivalent of self-government (426). When the Court acts on behalf of the minority view, as it did in vindicating habeas corpus for post-September 11 detainees, the need remains to explain how and why such decisions are legitimate.

In "Constitutional Democracy: A Paradoxical Union of Contradictory Terms?" (2001), Habermas addresses the same problem. He rearticulates the rights and democracy tension as the tension between private and public autonomy. Self-government reflects public autonomy: the freedom to participate in a law-making enterprise that produces the laws to which one is subject. Human rights, by contrast, implicate private autonomy: the recognition of a private space where individuals are free from government violence, control, or interference. The apparent "paradox" indicated in the article's title consists in the limits imposed on popular sovereignty (or public autonomy) by guarantees of individual rights (private autonomy). Habermas wants to point out that, in fact, the relationship between public and private autonomy is not paradoxical, but rather complementary. Legitimation becomes possible through two aspects of the lawmaking process: (1) "public and private autonomy require each other" (767), and (2) the generation of legal norms unfolds in historical time.

The complementary relationship between public and private autonomy is evident when one views the process of self-government as proceeding in two stages. First, participants bind themselves to law as the medium by which political association will be determined (Habermas 2001, 776). At this initial stage, they also understand that certain rights (e.g., equal treatment, freedom of action) are necessary before they can act in concert to carry out self-government. This first stage is somewhat abstract, but it must take place before actual lawmaking. As Habermas says, "Only when the private autonomy of individuals is secure are citizens in a position to make correct use of their political autonomy" (780). In the second stage, the concrete content of laws emerges as citizens respond to their environment and the needs and problems it generates, guided by their commitment to the binding force of law as articulated in the first stage.

This insight about the mutually enabling conditions of public and private autonomy is stated a bit differently by Benhabib (1989, 152) in her explanation of what she calls (crediting Habermas) "discursive legitimacy." Legitimacy entails justification in the sense that participants in lawmaking exchange reasons for their views and seek to persuade each other to accept these views as valid. The giving of reasons envisioned in discursive legitimacy forecloses certain views that could never be sustained (e.g., views opposed to egalitarianism). An anti-egalitarian, or antirights, position cannot be sustained, because the would-be bearers of rights would not assent to laws that treat them as inferior. Thus, the only way to instantiate laws that reject egalitarianism would be to exclude from the deliberative process those people who would be on the

"losing end" of such laws. This exclusion, of course, would violate the procedural requirement of full participation. Thus, Benhabib's reading of discursive legitimacy sheds additional light on how the idea of individual rights is bound up with popular sovereignty.¹

With regard to the second aspect of legitimization in a constitutional democracy—that is, the historical dimension—Habermas points out that legal norms are subject to contestation and correction over time. They are not fixed once and for all by the act of founding or constituting the political community, but are, rather, open to pragmatic reexamination over time. At certain key moments in constitutional history, such as the New Deal period, one sees that

groups hitherto discriminated against gain their own voice and ... hitherto underprivileged classes are put into a position to take their fate into their own hands. Once the interpretive battles have subsided, all parties recognize that the reforms are achievements, although they were at first sharply contested. (Habermas 2001, 774)

The recent interpretive work by the Supreme Court with regard to detainees' rights stands as another example of "reforms [that] are achievements, although they were at first sharply contested." Following the four Court decisions cited here, the Bush administration left office, and, immediately upon taking office, the new administration issued several executive orders reversing course on detention of terror suspects and interrogation practices.² In rendering its detainee decisions, the Court relied to a significant extent on its independent reviewing capacity, and the newly-elected chief executive sided with the Court, not with the preceding administration. This policy change evidences what Habermas refers to as the ongoing development of legal norms over time.

Habeas corpus is a right contained in the U.S. Constitution, but the *Boumediene* case interpreted its significance more broadly. It is also a principle of liberty that comes to us from its historical English origins in the Magna Carta. The Court could have interpreted the MCA as a suspension of the writ and thereby avoided conflict with the political branches. Article I allows for suspension, and such an interpretation would have preserved the majority preference expressed in the legis-

lation. In choosing the opposite course—in invalidating an act of Congress and reinstating individual rights that had been denied by the legislative majority—the Court used a procedure-independent standard of judgment. Its decision rested not on deference to the will of Congress, but rather on a reading of Anglo-American legal history that gave decisive weight to the importance of individual liberty. Habeas corpus was central to the story the Court told about the centuries-old struggle for individual rights against the executive branch. "Brennan and democracy—how to have both?" Michelman asks (1998, 399). "Brennan" here, of course, signifies not only the late justice himself, but also the notion of a substantive constitutional vision employed in the service of justice. The detainee cases, *Boumediene* in particular, provide a salutary example of a decision produced by such a view. The recent theorizations about the tensions between democracy and constitutionalism that I have reconstructed here make claims of legitimacy for the detainees' rights decisions more persuasive.³

NOTES

1. I take this to be a point about the relationship between full participation (democratic norm) and egalitarianism (rights norm).
2. Executive Order 13491, 74 F.R. 4893 (January 27, 2009); Executive Order 13492, 74 F.R. 4897 (January 27, 2009).

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